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HAROLD E. HURST

DENVER LAW JOURNAL

VOLUME 49 1973 NUMBER 4

HAROLD E. HURST

BY ROBERT B. YEGGE*

IT is with solemn sorrow and a deep feeling of personal loss that this issue of the *Denver Law Journal* is dedicated to Harold Emerson Hurst — teacher, colleague, friend — who died on December 18, 1972.

In 1956, I first met Professor Hurst as his student at the University of Denver College of Law. As my teacher in Criminal Law and Constitutional Law, I came to know of his dedication to, respect for, and professional commitment to the law.

Hurst had joined the College of Law faculty in 1947 as an Associate Professor and was advanced to Professor in 1950. He was appointed Acting Dean on May 1, 1958, and became Dean of the College in September 1961.

Dean Hurst was early committed to interdisciplinary studies after earning the Bachelor of Arts degree in 1936 and the Bachelor of Laws degree in 1938 from the University of Colorado, and the Master of Science in Government degree in 1940 from the University of Denver as an Alfred P. Sloan Fellow. During the years I knew Dean Hurst, he actively pursued his research interest and writing in the development of scientific methods of proof and the use of empirical facts in the judicial process.

In June 1965, Hurst submitted his resignation as Dean of the College, choosing to return to teaching full-time. It was my pleasant task to continue the work of a man who had guided me as a student and teacher.

Seldom does one find a colleague with the unshatterable determination of Harold Hurst. Among many other things, Professor Hurst actively contributed to the establishment and continuation of the Summer Minority Program. He was doggedly dedicated to this pioneer effort. Even in his last year when in poor health, he remained a true colleague, unwilling to shirk responsibilities, and determined to assume his full load.

To his wife, Esther, his daughters, Janet Marie and Pamela Ann, his son, Harold Frank, and his three grandchildren, this dedication is offered as a grateful remembrance of a friend.

* Dean, University of Denver College of Law.

HAROLD E. HURST

BY JOHN PHILLIP LINN*

IN dedicating this issue of the *Denver Law Journal* to the memory of Harold Emerson Hurst, the students of the University of Denver College of Law express their affection and admiration for a beloved professor, who administered to the needs of the students and of the University for a quarter of a century.

The present student body and, indeed, a majority of all alumni of the College of Law, had the opportunity to come under the influence of the teachings of Professor Hurst. Over the years he taught many subjects to many students, and to each class he brought an unusual scholarship, enriched by experience and mature contemplation.

By nature, Professor Hurst was a gentle and reflective person, a man of quiet persuasion. In an unhurried, deliberate, fair-minded manner he examined and evaluated the difficult legal and social questions propounded in the classroom. His care in analyzing complex and controversial constitutional issues attracted even the attention of the Supreme Court of the United States.

Professor Hurst cared deeply for the law and for a disciplined approach to legal reasoning, research, and writing. His own incisiveness instilled students with a keen desire to be equally precise, concise, and clear in their thoughts and expressions.

During his tenure as Dean of the College of Law, Professor Hurst sought with great courage and imagination to establish a center for leadership in the law. A man of great modesty, Dean Hurst had no need for pretense or personal publicity. He distinguished himself as an administrator in the same quiet manner that he established his stature as a teacher.

Dean Hurst and his charming wife, Esther, will long be remembered as gracious representatives of the College of Law. Many demands were made of them, but they gave unstintingly of themselves to bring credit to the University of Denver.

As an administrator and mentor at the College of Law, Professor Hurst gave his whole heart and intellect. His leadership and his teachings are a rich heritage for those of us who were his students, colleagues, and friends.

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* Professor of Law, University of Denver College of Law.

VIDEOTAPE TRIALS: RELIEF FOR OUR CONGESTED COURTS*

BY JAMES L. MCCRYSTAL**

INTRODUCTION

A salient hallmark of the modern historical era has been rampant technological growth, a phenomenon which has radically altered the very structure of human existence. Today, technological sophistication touches almost every aspect of our lives. One area of paramount importance to society, however, has remained relatively unaffected by the dramatic changes in material culture: the trial process. If John Marshall or Abraham Lincoln were to visit a modern courtroom, they would experience a comfortable familiarity with the proceedings. If, on the other hand, the doctors who attended these famous jurists at their deathbeds were to visit a modern hospital operating room, they would doubtlessly express a high degree of incredulity and perplexity with respect to the modern techniques employed therein. This hypothetical comparison of the medical and legal professions is presented only to illustrate the fact that, in large part, the litigative process has remained an island sanctuary in the midst of the modern technological revolution.

This is not to say that our judicial system has enjoyed no benefits from technological developments. Indirectly, technology has enhanced the search for truth through its effect upon evidentiary concerns via modern scientific inventions (such as radar and x-ray machines) and techniques (blood-grouping and ballistics testing, for example). The tasks of court administrators and managers have been significantly eased through the

* The author wishes to acknowledge the assistance of James L. Young, Director, Ohio Legal Center Institute; Dean David Link, University of Notre Dame School of Law; and James L. McCrystal, Jr., student, University of Notre Dame School of Law. Special appreciation is extended to Scott Anderson, Jr., and Thomas L. Roberts, students, University of Denver College of Law, for their generous contribution to the preparation of this article.

** Judge, Court of Common Pleas, Erie County, Sandusky, Ohio; Ph. B., John Carroll University, 1940, J.D., University of Michigan, 1943. [The author was the presiding judge at the *McCall* trial described in the article and one of the draftsmen of Superintendence Rule 15 set forth in the Appendix — Ed.]

use of computer programming for scheduling and data collection purposes.[1] Though such instances are numerous, the fact remains that once the bailiff raps his gavel and announces, "Hear ye, hear ye, this court is now in session," the trial process which ensues is presently conducted in substantially the same manner as it has been for the past several centuries.

To a great extent because of this hoary process, court docket congestion is a serious problem of our times. The steadily increasing magnitude of court congestion is threatening to inundate the legal process.[2] In the last few decades, several devices have been employed to relieve court congestion. Modern liberalized rules of discovery and pleading have helped to shorten trials and promote settlements out of court. Another method to ameliorate the burden on the courts has been the alteration of fundamental legal rights, removing decisionmaking responsibilities from the court and jury (workmen's compensation and no-fault automobile insurance are examples). Comparatively little attention and effort, however, have been directed to streamlining the trial process itself in a manner which permits retention of the jury system through the expedition of the jury trial procedure itself. This article will address the latter alternative and discuss the potential advantages to be derived from the integration of one modern technological invention — that of videtotape — into the trial process.

Videotaping has already been introduced into the legal system for limited uses (depositions, demonstrative evidence, and records for appeal),[3] but, in the author's opinion, its advantages have not as yet been fully exploited. The purpose of this article is to draw attention to the potential benefits to be gained from the use of videotaping in lieu of testimony at trial in a way which will expedite and fundamentally improve conventional trial court methods. Discussion will focus on actual experimentation with a videotape trial conducted in Ohio, and the changes in the Ohio Rules of Civil Procedure precipitated by this experiment.

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[1] Adams, *The Move Towards Modern Data Management in the Courts*, 23 FLA. L. REV. 250 (1971).

[2] H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT (1959); Desmond, *Juries in Civil Cases — Yes or No?*, 36 N.Y.S.B.J. 104 (1964); Comment, *Abolition of the Civil Jury: Proposed Alternatives*, 15 DE PAUL L. REV. 416, 417 (1966); Comment, *The Streamlined Jury System*, 36 S. CAL. L. REV. 89, 90-92 (1962).

[3] *See* pp. 465-66 *infra*.

I. Substitutional Uses of Videotape

The videotape process is a recent technological advancement, first put to use on a practical scale by the television industry in the mid-1950's.[4] Although its employment soon became commonplace in television, the videotape technique was introduced into the legal arena only in the last few years. In this brief span of time, however, utilization of the videotape in the legal process has found several outlets.[5] In alcohol-related driving offenses, for example, videotapes of defendants are made at the time of arrest and later presented to the jury at trial as a type of demonstrative evidence, enabling the jurors to witness the behavior and demeanor of the defendant as he was at the time of his apprehension.[6] In criminal trials, videotapes of defendants have been successfully introduced into evidence.[7] Significantly, and no doubt a presage of changes on a broader scale, the Federal Rules of Civil Procedure were modified 3 years ago to permit the recording of depositions by other than stenographic means.[8] This rule faced an early challenge in a case involving the use of a videotape deposition and was upheld as the court approved this modern method of recording depositions.[9] Several states now allow videotape depositions to be used at trial in lieu of the traditional written type.[10] The videotape recording method has appealed to some judicial administrators as a potentially effective means by

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[4] Comment, *Videotape: A New Horizon in Evidence*, 4 John Marsh. J. Prac. & Proc. 339 n.1 (1971).

[5] For a well-documented treatment of the various uses of videotape in the legal system, present and potential, see Comment, *Judicial Administration — Technological Advances — Uses of Video-tape in the Court Room and Station House*, 20 De Paul L. Rev. 924 (1971).

[6] Kane, *Videotape Recording*, 50 Judicature 272 (1967).

[7] State v. Lusk, 452 S.W.2d 219 (Mo. 1970); Paramore v. State, 229 So. 2d 855 (Fla. 1969), *noted in* Stewart, *Videotape: Use in Demonstrative Evidence*, 21 Def. L.J. 253, 256 (1972).

[8] Fed. R. Civ. P. 30(b)(4). Effective on July 1, 1970, the rule provides:

> The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made a party may nevertheless arrange to have a stenographic transcription made at his own expense.

[9] Carson v. Burlington N., Inc., 52 F.R.D. 492 (D. Neb. 1971), *noted in* Stewart, *supra* note 7, at 259.

[10] *See, e.g.*, Ohio R. Civ. P. 40(B) in Appendix; Blews & Patterson, *On Trial: Videotape*, 46 Fla. B.J. 159 (1972); Wong, *More States Allow the Use of Videotapes in Court as Substitutes for Live Appearances by Witness*, Wall Street Journal, Sept. 5, 1972, at 28. Also, as the *Carson* case, *supra* note 9, implies, a rule which allows recording of a deposition by "other than stenographic means" may be construed to permit recording

which to prepare the official trial record. Experiments conducted in the state of Illinois testing the efficacy of this notion have led to positive results.[11] The preceding examples illustrate the fact that a growing segment of the legal community is receptive toward the adoption of modern technological devices into the legal system as a means to bring about improvements in conventional trial practice. In sum, the advantages of videotaping in the context of the courtroom setting have been recognized by several jurisdictions, and although the practice is by no means catholic as yet, these technological inroads appear to be of no light moment. Rather it seems that the practice signals a far more widespread usage in the future.

The uses of videotape described above, however, are limited in character and do not work any profound change upon the nature of the conventional trial system. They are mere substitutes for, and additions to, traditional modes of presentation of evidence and the preparation of trial records. At present they promise no real departure from the methods of the past. Although these uses allow a fact finder a broader base upon which to evaluate proffered evidence, they only comprise a substitute for and refinement of conventional evidentiary methods. These limited applications of videotape have not wrought and do not promise to effect any fundamental change in the age-old conduct of trials.

II. ENTIRE TRIAL BY VIDEOTAPE

In 1971, this author suggested that, as compared to the present restricted uses of videotaping in the courtroom, the videotape recording method could yield far greater benefits for the trial process if utilized for the examination of *all* witnesses in a civil suit.[12] Rather than using videotape on a piecemeal basis as a substitute for parts of the testimonial process, it could supplant that process entirely. In other words, the whole trial (with the exception of voir dire, opening statements, and closing arguments) could be conducted by videotape as a means to expedite trials in a manner which would ultimately lead to enhanced efficiency in the litigative process and

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by videotape. Since some states have similar rules, the use of videotape depositions promises to increase in the future. *See, e.g.*, ALA. R. CIV. P. 75.

[11] Madden, *Illinois Pioneers Videotaping of Trials*, 55 A.B.A.J. 457 (1969); Sullivan, *Court Record by Video-Tape Experiment — A Success*, 50 CHI. B. REC. 336 (1969), in 41 N.Y.S.B.J. 695 (1969).

[12] McCrystal, *Videotape Trials*, 44 OHIO B. 639 (1971).

thus serve to decrease docket backlogs and relieve the present overwhelming burden on the court system. To investigate the efficacy of this idea, it was proposed by this writer that a pilot videotape trial be conducted in order to afford the bench and bar an opportunity to evaluate the suggestion. The proposal was soon given the means of its accomplishment through a generous grant from the Ohio Judicial Conference. All, then, that was lacking was a legal controversy, ripe for litigation, in which all participants would consent to the trial of the case in this experimental (albeit for these parties, final) mode. An ideal dispute was found, and in November of 1971, the concept of videotape trials had its first day in court.

A. *McCall v. Clemens: The First Videotape Trial*

McCall v. Clemens,[13] became the first case in legal annals to be tried almost in its entirety through the medium of videotape. The plaintiff, McCall, was walking upon a city sidewalk when he was struck by an automobile driven by the defendant, Mrs. Clemens, who had lost control of her car. Liability, having been admitted, was not at issue. McCall alleged in his complaint that he had suffered serious injury to his left shoulder, arm, and hand. The trial was restricted to the resolution of a single issue: the nature and extent of the plaintiff's alleged injuries and the amount of compensatory damages. Being an uncomplicated and relatively simple action, *McCall* was ideally suited to the needs of an experimental test of the utility of the videotape trial proposal.[14] As a personal injury suit involving a moderate claim, it was the type of case which typically consumes a substantial portion of docket time in many civil courts. Success with this kind of action, therefore, could well presage a significant impact upon docketing in the future. In addition, it is with this type of case that trial lawyers most often express grave doubts with respect to the quality of a trial conducted by prerecorded testimony. Thus, the *McCall* case provided a testing ground for the misgivings which typically arise in the trial attorney's mind when confronted with the idea of videotape trials.

Four witnesses testified in *McCall*: the plaintiff, a policeman, a doctor, and a hospital records librarian. All of the testimony was gathered and recorded 1 to 2 weeks in advance of

[13] No. 39,301 (C.P. Erie County, Ohio, Nov. 18, 1971). This case first received national attention following the publication of Gunther, *Is Videotape the Answer for our Crowded Courts?*, TV GUIDE, MAR. 25, 1972, at 6.

[14] Murray, *Comments on a Videotape Trial — From Counsel for the Plaintiff*, 45 OHIO B. 25-27 (1972).

the actual trial. Each witness was examined in the presence of the parties, the attorneys, and the videotape technician.[15] The format of the examinations closely resembled that of the present-day deposition, however, the crucial difference was that the testimonial process was conducted as if it were taking place before the court. Questions were necessarily restricted to those tending to elicit evidence legally admissible in a court of law. In other words, the narrower trial concept of relevance operated to restrict the form of questions and the content of answers to admissible testimony, as opposed to the broader concept of relevance to the subject matter as now applies to the taking of depositions. Objections to the questions and answers were made immediately as they arose according to conventional trial practice (the videotape operator noting the precise moment of the objection for future reference). However, in the absence of the trial judge, no rulings were made concerning the objections at the time of the recording session.

The day after all of the testimonial evidence was completed and recorded, the judge met with the two attorneys to view portions of the unedited master tape in order to rule upon the objections. Using a digital counter device on the recorder, the videotape operator located on the master tape the questions and answers to which objections had been raised. The court viewed this selected footage and heard arguments of the attorneys with respect to the objections and rendered its rulings. If the objection was overruled, the question and answer remained on the tape, but the objection was deleted. If the objection was sustained by the court, the question, the answer, and the objection were all ordered deleted from the finished tape which the jury later viewed. In the presence of the court, the trial tape was prepared from the unedited master tape. The trial tape was, of course, shorter than the original master tape because only those questions and answers which the court deemed admissible were retained. The unedited and complete master tape, containing all questions, answers, and comments of counsel, was filed with the court and preserved for the purpose of appeal should either party later challenge the proceedings. Following preparation of the trial tape, the court rendered its instructions to the jury which were recorded and made part of the trial tape.

[15] The doctor's testimony was originally taken on videotape as a deposition. When I learned of the excellent results, I then asked counsel for both parties if they and their clients would agree to complete the entire trial by videotape. All concerned consented, thus allowing the first videotape trial to be conducted.

The actual trial commenced at 9 o'clock on the morning of November 18, 1971. The jury was impaneled in the usual manner with the attorneys conducting the voir dire in the presence of the court. Given the novel character of the proceedings the attitudes of the prospective jurors concerning their perceived ability to render a fair and impartial verdict on the basis of recorded testimony was investigated thoroughly. After the jury was seated, both attorneys personally delivered their opening statements. At the close of those statements, the videotape monitors were turned on, and the jury viewed the testimony that had been recorded well in advance of the trial.[16] Normal recesses were taken, and when the testimony was concluded, the two attorneys delivered their closing arguments in person. Thereafter, the court's instructions were shown on videotape, and then the jury retired to consider its verdict.

The full courtroom presentation and jury deliberation took only 1 day, commencing at 9 o'clock in the morning and ending with a verdict at 5 o'clock in the afternoon.[17] If conducted in the usual manner, this action could easily have consumed 2 days' time. The recorded testimony ran approximately 2 hours and 40 minutes, and the jury was able to view it without interruption. The court never viewed the entire testimony and needed only 15 minutes to rule on counsels' objections. Except for voir dire, opening statements, and closing arguments (which were recorded for inclusion in the trial record), the complete presentation of the dispute to the jury was accomplished through technological means.

The reactions of the principal actors and participants in this unique experiment were, on the whole, positive and favorable, and this pilot trial generated much discussion in the legal community.[18] The advantages of trial by videotape are many and varied. Following a brief consideration of them, we will turn to a discussion of what *McCall* portended for the trial process in the state of Ohio, in particular, and what it may portend for the United States in general.

B. *The Advantages of Videotape Trials*

The *McCall* experiment and other ventures involving the use of videotape in the trial context have demonstrably shown

[16] At the time of the trial when the jury viewed the videotape, one witness, the doctor, was in Hawaii.

[17] The jury returned a verdict for $9600. No appeal was taken.

[18] McCrystal, *Ohio's First Videotape Trial: The Judge's Critique*, 45 OHIO B. 1 (1972); Murray, *supra* note 14; Watts, *Comments on a Video Tape Trial — From Counsel for the Defense*, 45 OHIO B. 51 (1972); Symposium, *First Videotape Trial: Experiment in Ohio*, 21 DEF. L.J. 267 (1972).

that many benefits are to be gained from the proper utilization of this innovative technique within the judicial system. Advantages accrue to each actor in the trial process, and cumulatively, these benefits may be said to work a fundamental improvement upon conventional trial practice. Although some problems remain to be solved in the future, even at this early experimental stage, the videotape process has already proven its worth and inestimable value to those who have witnessed its working firsthand.

At this point in time, the concept of the videotape trial is still at an early stage of development. As of the date of this writing, only the *McCall* experiment and four other trials in Ohio have been conducted completely via the medium of videotape.[19] In view of the nascence of the idea, no empirical data exists from which to generalize findings concerning the merits of videotape trials vis-a-vis the conventional trial scheme. Therefore, the purported advantages outlined in this section are not as yet amenable to documentary support, but rather derive primarily from the author's 21 years of experience as a trial judge and his involvement in the *McCall* experiment.[20] Given this state of affairs, the discussion is necessarily rather intuitive in content, informal in tone, and certainly more suggestive than conclusive, and does not purport to represent a truly definitive statement on the merits of the idea. Rather, it is admittedly hoped that this somewhat cursory listing of advantages to be derived from the videotape trial technique will stimulate interest in the idea among the members of the legal community, leading to further experimentation and more thorough investigation of the possible ramifications of the idea within our system of justice. More definite answers and the resolution of possible doubts can only be provided through the trial and error of actual experience.

The numerous advantages of the videotape trial are perhaps most profitably demonstrated as they relate to particular participants in the trial process. Therefore, we shall now con-

[19] To this author's knowledge, the other videotape trials which have been conducted as of the date of this writing include one in Cuyahoga County, Ohio (Judge Francis Talty presiding) and two in Summit County, Ohio (Judge James Barbuto presiding). The latter two, one civil and one criminal, were conducted simultaneously by the same trial judge. For descriptions of them, see Bandy, *Summit Jury Pioneers Trial by Television,* Akron Beacon Journal, Aug. 2, 1972, at A-12, col. 1; *Akron Juries See Trials on Edited Video Tapes,* N.Y. Times, Aug. 14, 1972, § L, at 55, col. 3. A second videotape trial conducted by this author was Swain v. Norfolk & W. Ry. Co., No. 39,494 (C.P. Erie County, Ohio, Jan. 24, 1973).

[20] For a detailed and comprehensive discussion of the advantages potentially derivable from videotape trials, see Morrill, *Enter — The Video-Tape Trial,* 3 JOHN MARSH. J. PRAC. & PROC. 339 (1971).

sider what the videotape trial does and can mean for the following six groups of persons: court administrators, the trial courts, the jury, the trial attorneys, witnesses, and the appellate courts.

1. The Court System and Its Management

The traditional American jury system has been the object of much critical scrutiny in recent years and appears to be losing support among a discernible segment of the bench and bar.[21] This negative assessment of the jury system in modern times is largely a function of the tremendously overburdened and crowded dockets in large urban areas which lead to delays between complaint and trial inimical to the concept of speedy trial. As society becomes increasingly more "litigation prone," this problem promises to reach even more serious proportions. The videotape procedure could offer significant amelioration of this problem in several ways.

The videotape method could prevent many disputes from ever reaching the trial stage. The taping of all the testimony and evidence prior to submitting it to the jury should result in a greater probability of settlement since the evidence will then hold no unknown elements. After a copy of the trial has been prepared and the court has ruled on all of the objections, the attorneys and parties will be in a position to evaluate the effectiveness of their case realistically and definitively by reviewing what the jury will *actually* see (as opposed to what the attorneys *expect* the jury to see) should the matter proceed to trial. Settlement talks should become more realistic, because certain variables which now prevent pretrial resolution, such as the effectiveness of a key witness' presentation, will be known in advance. Thus, deliberations concerning settlement will be limited to what the jury will actually see and possible uncertainties as to what the evidence will adduce will have no place in such discussions. Presently, for example, attorneys often postpone truly serious settlement negotiations until after a key witness has testified and his testimony can be evaluated or until a ruling on an evidentiary matter crucial to his case is made. With videotape, this can be done well before the jury is impaneled, and more importantly, the necessity of a judge spending several valuable days presiding over what turns out to be a needless judicial exercise should be avoided. Rather than guessing at the strength of each side's case, lawyers will be able to bargain from a knowledgeable position.

[21] Sources cited note 2 *supra*.

Since matters will not be set for trial until the videotape is completed, the length of trial will be known in advance. Such knowledge will dramatically enhance the scheduling process, leading to firm settings for hearings and trials and a more efficient use of the court's time and facilities. Delays resulting from overly conservative estimations regarding the anticipated length of trial will be averted.

When a dispute reaches the trial stage, many other advantages of the time-saving variety will derive from the videotape procedure. No in-trial time will be expended for bench or chamber conferences, for settlement negotiations, or for rulings on motions. There will be no last minute delays in waiting for late witnesses or for procuring necessary real evidence. Recesses to allow the attorneys to prepare closing arguments or for the court to prepare its instructions will not be necessary. The ever-present specter of mistrial caused by misconduct of witnesses or counsel which now inheres in the trial process will be avoided altogether, since the testimony will be ruled upon and edited prior to its submission to the trier of fact. The cumulative result of all of these benefits will be smoother trials. Distractions will be largely eliminated, fostering continuity, and maximizing the jury's opportunity to reach a result consistent with the evidence.

Although courts will necessarily incur expenses in procuring and maintaining the necessary equipment, and of course, training and paying its operators, there still would be a net economic savings.[22] Since videotape trials can be held in small viewing rooms, as opposed to the larger courtrooms required for traditional jury trials, the costs of physical facilities could be significantly reduced. Additionally, the preparation of the record for appeal will be simplified. The only additional effort at trial would be the recording of the voir dire, opening statements, and closing arguments.

2. The Trial Court

Videotape trials, as clearly illustrated by the *McCall* case, will effect a drastic reduction in the amount of time which an individual trial judge must devote to hearing a case in most instances. The judge need not preside over the presentation of all of the testimony but need only hear that testimony related

[22] The cost of videotaping trials is less expensive than most persons would first imagine. For example, the Ohio Judicial Conference grant to conduct the *McCall* pilot trial was $1000. The actual total cost for the videotape expense (including machine rental, operator, and tapes) was only $360.

to objections or motions raised by counsel. Of course, where the court is required to rule upon a motion for a directed verdict or for judgment notwithstanding the verdict, it must view all of the relevant testimony. However, in view of the fact that the taped trial will take much less time to view than it now takes to hear an entire case, a time saving will ensue in this instance as well.

At present, when objections are raised or motions made during the course of the trial, the court is ordinarily compelled to render its ruling at once under pressure to expedite the proceedings. The videotape procedure will render the on-the-spot ruling unnecessary. When such objections and motions are recorded on videotape, the court may view them at its convenience in chambers with increased temporal latitude within which to evaluate the merits of the particular issue. Allowing the court ample time to consider its decisions, with no delay to other participants in the matter, should significantly reduce incorrect rulings and resultant prejudicial error, leading to increased fairness to all concerned and fewer appeals. The same circumstances and reasoning apply to jury instructions.

Since there is nothing that the attorneys and the judge can do while the trial tape is being shown to the jury, there is no reason why they should remain in the courtroom. A supervisory person in the court's control (such as the bailiff) can attend to and observe the jury in order to insure that no conversations occur and that the proceedings are properly conducted. At recesses, this supervisory person can discharge the court's traditional duty of admonishing the jury with respect to their behavior when out of the courtroom. Fewer judges could handle a greater trial load since the court's presence is required only during the opening and closing phases of the trial. Additionally, a single trial judge could actually preside over more than one trial simultaneously.[23] Thus, more than one trial may be set for an individual judge during a particular time slot without causing a conflict. Realization of these savings of the court's time will enable far more cases to be tried to juries.

3. The Jury

The videotape technique will simplify the task of the jury in several important respects. A prominent advantage is created by the fact that prospective jurors will be called only for trials

[23] *See* Summit County cases, *supra* note 19.

in which the need for them to return a verdict is certain. No longer will jurors be summoned to sit patiently through a long trial only to have the case taken from it by a directed verdict. Under the proposed procedure, the jury will be called only after the court has overruled motions for a directed verdict and the necessity of its verdict is a certainty.

Total jury time will be shorter and what is heard during that time restricted to purely evidentiary matters and arguments of counsel. No time will be unproductively expended in waiting for tardy witnesses to appear, for the judge to rule upon motions or objections, or for bench or settlement conferences to conclude. In short, none of the traditional interruptions now experienced at trial which the jury is asked to endure patiently will plague the videotape trial. Such distractions will be eliminated, and the jury will have advance knowledge as to exactly how much time it will take to hear all of the evidence.

In addition to great patience, we presently require jurors to display an omniscient ear and a selective memory. It is with respect to these expectations that the videotape trial will fundamentally improve conventional trial practice. During almost every trial, objections are raised to questions and answers. Ordinarily, certain of these objections will be sustained by the court and the relevant testimony ordered stricken from the record and the jury admonished to put out of mind that which it has experienced. The jurors are expected to hear and retain all of the questions and answers, but when an objection is sustained, they are expected to forget the objectionable material. To ask a juror to erase a segment of his experience upon demand is to require of him an act beyond human capacity. This problem is avoided entirely by the videotape method because only that testimony which has not been objected to by counsel and that testimony objected to but deemed admissible by the court are shown to the jury. The jurors can concentrate fully upon remembering all of the testimony which they will view. There will be no admonitions to the jury, instructing them to disregard and forget certain testimony selectively and upon demand. The absence of delays and avoidance of interruptions during the presentation of evidence will function to enhance continuity of the trial and avert distractions, and thus, maximize the jury's opportunity to digest the evidence and come to a verdict in conformity with that evidence.

The videotape procedure will allow greater and more effective use of the jury view, now an expensive and time-consuming practice. Since views or out-of-court experiments can be recorded and shown to the jury in court, travel to the scene is obviated, and the delay in trial necessitated by a view is minimized. A more complete view of a scene or any matter in controversy can be given to the jury on videotape. Such a view will also be from a single point of view, as determined by counsel, and each juror will see exactly the same picture, thus enhancing uniformity of observation of important demonstrative evidence. Also, a jury view as presently conducted often fails to portray fully how a disputed incident occurred for the reason that conditions during the view differ from those which existed at the time of the event in question. Given videotape, the scene can be recorded when conditions most closely approximate those in being at the time of the event in dispute. The jury's understanding of the events relative to the scene can be further enhanced by the integration of testimony and the use of diagrams, charts, and closeups in the view segment of the videotape. Additionally, since the jurors never go to the scene, the problem of misconduct of a juror during the view is eliminated.

The order of the presentation of evidence by videotape is amenable to a control and structuring not always achievable under present trial practice when an unforseen circumstance, such as the sudden unavailability of an important witness, arises. All testimony will be in context and ordered clearly and logically to enhance understanding of the issues which the jury must resolve by its verdict.

The above discussion highlights some of the advantages enjoyed by the jury when the videotape trial method is employed. Some minor problems of a mechanical nature remain to be solved.[24] However, the positive attributes of a videotape trial from the point of view of the jury would appear to represent a significant improvement of trial practice in a way which will enhance the evaluative and deliberative processes and, as a result, lead to more logical, consistent, and uniform jury verdicts.

4. The Attorneys

Attorneys will benefit from the videotape trial method in

[24] *See* Watts, *supra* note 18, at 52-53. For an excellent discussion of the technical capabilities of videotape and its potential value for the legal profession, see Stone, *Use of Videotape in the Legal Profession*, 45 OHIO B. 1213 (1972).

various ways. First, the attorneys can conduct the taping at a mutually convenient time and place. This allows greater flexibility in scheduling their individual daily calendars. This procedure also allows them to examine witnesses in the order best suited to develop the issues inherent in the dispute, not in the manner dictated by the availability of witnesses at trial time. Even if witnesses cannot be examined in the preferred sequence, the order of testimony can be rearranged with the permission of the court in the editing process so as to present the evidence in the most understandable fashion. The attorney and witness both are able to maintain continuity because testimony is not interrupted by the recesses which often occur in live trials. As mentioned previously, effective and full use of the advantages of the jury view can be more routinely utilized under the videotape system in order to impart to the jury a fuller understanding of the events involved in the controversy.

The element of surprise is virtually eliminated by this method of presentation. Pressure associated with the omnipresent possibility of surprise will not be a factor, and the lawyers can attend more closely to what the evidence will show. Knowing the full content of the evidence in advance will also allow more time for the preparation of objections, motions, and briefs for evidentiary questions, directed verdicts, and similar questions which ordinarily arise during the course of a courtroom trial. Opening statements would involve comments by the attorneys concerning only what the evidence *does* show, not, as at present, what the attorney *expects* the evidence to show. With respect to closing arguments, attorneys will have ample time to prepare and perfect this important phase of the case and not be limited to a hurried drafting prepared during a recess. These qualities of the videotape trial will tend to reduce pressure upon attorneys and, thus, minimize the likelihood of a fatal mistake at trial. In addition, the personality of the advocate will assume a diminished importance in the trial context, tending to reward careful and thorough pretrial preparation, and making reality conform more closely to the ideal that theatrical talent of counsel should be extraneous to the proper resolution of a legal dispute.

The effective use of expert witnesses would be furthered by the videotape technique. Their cost, for example, would likely be reduced because the expert's testimony could be recorded at his convenience in his office or laboratory. Also,

lawyers with specialized knowledge could be employed to examine a particular expert. Trial counsel could then familiarize himself with the esoteric aspects of the case in less time, since the examination of the expert witness could be conducted by a lawyer already equipped with the expertise necessary for thorough and proper examination. Adoption of this specialized use of attorneys would lead to a wider participation in trial practice within the legal community.

5. The Witnesses

Witnesses would also, of course, benefit from the expanded scheduling flexibility offered by the videotape method. The time of their appearance can be arranged to meet the demands of their personal schedules. Also, doctors can testify in a hospital or their offices, where records are available, requiring minimal interruption of their professional duties. Incapacitated and very elderly persons can testify in their homes without having to make the trip to the courthouse. Instead of the dull and dry spectacle of a lawyer reading a written deposition of the testimony of unavailable witnesses into the trial record, the jury has the advantage of viewing such a witness with the opportunity to observe his demeanor and comportment. In short, witnesses can testify under circumstances most favorable to them and under conditions in which their testimony is likely to be best presented.

Testimony can be taken and preserved at a time much closer to the transaction or occurrence at issue. The usual delay from complaint to trial which often hinders a witness's memory, rendering his testimony inconclusive, will be avoided. In personal injury actions, for example, the use of videotape makes it possible to record testimony relating to liability at a time when the memories of the witnesses are fresh, while the medical testimony relating to the nature, extent, and permanency of injuries can be recorded at a much later date when the experts are best equipped to give a proper prognosis. Thus, testimony can be taken at the time when it will be most useful and effective, rather than as dictated by the trial date.

Witnesses could actually testify at the scene of an accident in order to demonstrate more clearly for the jury just how the event occurred. Rather than, as today, relying on a jury view or diagram, supplemented by in-court testimony, the entire procedure can be accomplished more expeditiously and completely by combining both the view and the witness offering explanatory testimony in the same recorded sequence.

The atmosphere during the videotape witness examination is more relaxed as compared to the courtroom witness stand. Therefore, witnesses will testify in a more natural manner, free from nervous tension resulting from the atmosphere of the courtroom which can tend to cause forgetfulness and mistakes necessitating the ordering of a mistrial. The probability of nervousness destroying the worth of a reliable and important witness can be substantially reduced as a result of the more relaxed atmosphere in the videotape procedure.

The witness will literally be the center of the jury's attention as he fills the screen of the videotape monitor. Normal courtroom distractions will be absent (including those which some attorneys intentionally create), allowing the jury to attend solely to the evidence at hand with increased concentration.

6. The Appellate Court

The videotape trial promises to be of inestimable value with respect to sustained appeals leading to new trials. The appellate court would view unedited portions of the master tape which had been the subject of rulings on objections. On remand, the trial tape can merely be re-edited to conform with the directions of the appellate court and viewed by a new jury. Thus, the tremendous expense and time required by a new trial can be substantially avoided. The appellate court need not be concerned with the possibility that a party's case could be destroyed by the loss of an important witness' testimony. In addition, the appellate court would be in a much stronger position to rule upon a matter appealed which is within the discretionary power of the trial court. Abuse of discretion would become more apparent as the appellate court literally steps into the shoes of the trial court in hearing testimony.

III. IMPLEMENTATION OF VIDEOTAPE TRIALS

As a result of the overwhelmingly favorable response to the *McCall* experiment,[25] the Ohio Supreme Court, on January 15, 1972, submitted to the state General Assembly the following proposed addition to the Ohio Rules of Civil Procedure:

> Rule 40 — *Pre-recorded testimony* — All of the testimony and such other evidence as may be appropriate may be presented at a trial by videotape, subject to the provisions of the Rules of Superintendence.[26]

[25] The Director of the Ohio Legal Center Institute observed the *McCall* trial and labelled the experiment an "unqualified success" with "a far greater potential than anyone had envisioned." McCrystal, *supra* note 18, at 2. *See also* articles cited note 18 *supra*.

[26] OHIO R. CIV. P. 40 (Supp. 1972).

Meeting with the legislature's approval, the rule was adopted and became effective on July 1, 1972. Thus, the State of Ohio became the first American jurisdiction in which the employment of videotape to present *all* of the trial testimony and evidence has been explicitly approved. On September 1, 1972, Superintendence Rule 15, "Testimony and Other Evidence Recorded on Videotape,"[27] was promulgated by the Ohio Supreme Court. This rule dictates the implementation of Ohio Rule of Civil Procedure 40 and regulates by detailed direction the manner in which testimony is to be taken, presented, and preserved in a videotape trial. Effective January 5, 1973, Superintendence Rule 15 was amended, and the supreme court issued two additional rules related to the use of videotape in courtroom proceedings: Superintendence Rule 10, "Verbatim Transcripts; Recording Devices," providing for the use of videotape as the official trial record, and Superintendence Rule 11, "Improper Publicizing of Court Proceedings," prohibiting, on pain of contempt, unauthorized uses of mechanical recording devices in and around courts during sessions. This article will conclude with a brief consideration of Superintendence Rule 15. Salient points from the following subsections of the rule will be highlighted: (1) scope of the rule, (2) depositions, (3) presentation of evidence solely by videotape, (4) transcripts, (5) equipment, (6) assessment of costs, and (7) disposition of videotapes filed with the court. (See Appendix for full texts of the rules.)

Subsection (A) defines the scope of the rule and clearly demonstrates Ohio's commitment to videotape trials by directing application of the rule to all courts of record in the state and to all appellate courts in the review of cases which contain vidotape evidence in the record of appeal.[28]

As will be seen later, other subsections of the Superintendence Rule require the courts to provide storage facilities, certain minimum equipment, and competent operators. All Ohio trial courts of record must, under the rule, be prepared to hold videotape trials. This preparation may involve a substantial reallocation of the court's resources of space, personnel, and money.

Superintendence Rule 15(B) prescribes the manner in which videotape depositions are to be taken, filed with the court, and prepared for presentation at trial.[29] The subsection begins with the authorization of the recording of depositions by video-

[27] OHIO SUPT. R. 15 (see App.).
[28] *Id.* at 15(A).
[29] *Id.* at 15(B).

tape, outlining the type of notice that must be given, officers capable of taking the deposition, and the method of certification. In general, these requirements are the same as those for the recording of a deposition by traditional methods, *i.e.*, stenographically.[30]

At this point the similarity with previous procedure disappears.[31] If no objections are made by any of the parties during the deposition, the officer, upon request of any party, shall file the tape along with the certification with the court. However, if objections were made and a party so requests, the officer will file the tape with the *trial judge* for the purpose of obtaining rulings upon the objections. The rule, however, provides that an audio sound track of the deposition is sufficient for this purpose.

The trial judge will then rule on the objections. He may view the entire videotape or only those parts to which objections have been raised. The trial judge's rulings and instructions for editing will be returned with the videotape to the officer and notice of the same given to the parties. The officer will then edit the videotape according to the judge's instructions, eliminating all references to objections. This being completed, the officer will then file with the *court* both the original and the edited tapes.

Except upon an order of the trial judge, the videotape filed with the court will not be available for inspection or viewing prior to trial. However, the clerk of the court may release the tapes to the officer of the deposition in order to make a copy for a party.

Any objections not previously raised nor waived may be made at trial, but only before the testimony in question has been presented to the jury. If the objection is sustained, the tape will be edited to conform to the judge's ruling.

Subsection (C) is applicable when Rule of Civil Procedure 40 is invoked and the entirety of the testimony and evidence is presented by videotape.[32] Such a trial, consisting of only videotape evidence may be held under agreement of all of the parties and with the consent of the trial judge, or the court may in its discretion order the trial conducted by videotape.[33] The best evidence rule and the limitations normally placed upon the use of

[30] *Id.* at 15(B)(1-5).
[31] *Id.* at 15(B)(6-9).
[32] *Id.* at 15(C).
[33] *Id.* at 15(C)(2).

depositions are inapplicable in such a trial.[34] Additionally, no objections will be entertained during the presentation of the testimony.[35]

Subsection (C) also provides that neither the attorneys nor the trial judge must be present in the courtroom while the jury is viewing the testimony.[36] However, the trial judge is not to leave the courtroom without instructing the jury as to their duties and responsibilities or without leaving the jury in the charge of an official of the court. The judge, however, still has the same duties and responsibilities as he would were he in the courtroom.

Subsection (D) confers discretionary power upon the trial judge to designate the means to be utilized in the preparation of the official transcript.[37] Any recording techniques permitted by Superintendence Rule 10 may be employed to preserve the proceedings. If the record is made by videotape, a party who desires to inspect the transcript may do so by requesting a copy (at his cost), or in lieu thereof, he may view the official tape. To expedite this viewing process, the party must designate (by reference to the event, tape reel number, and time counter reading) the portions of the tape which he wishes to view.

Subsection (E) of Superintendence Rule 15 specifies the equipment to be used and the facilities the court must provide for videotape trials.[38] In order to reduce inconsistency, the Japanese standard one-half inch videotape and its recording and playback machines are designated for use. Any party recording testimony on an incompatible tape must pay for the conversion to the standard tape. The court must provide playback and reproducing facilities. It may, however, purchase, lease, or contract for the availability of the equipment when needed at its own option. It may also train its own personnel or contract for the services of a competent operator. The court, as a minimum, must have a videotape player and monitor, having a 14-inch screen. They need not be color. The court is also responsible for proper maintenance of the equipment, including the periodic playing of a test tape.

Subsection (F) sets out by whom the various costs of a

[34] *Id.* at 15(C)(1). This provision applies only to trials where *all* of the testimony is by videotape.

[35] This rule is in contrast to that for videotape depositions only. *Id.* at 15(C)(4). *Compare with Id.* at 15(B)(9).

[36] *Id.* at 15(C)(5).

[37] *Id.* at 15(D).

[38] *Id.* at 15(E).

videotape trial are to be borne.[39] As a general rule, it can be said that the cost of the videotape upon which testimony is recorded shall be borne by the proponent of the testimony, if the original, or the requesting party, if a copy. All other costs, except that of playing the tape to the jury, which is an expense of the court, will be treated as costs in the action.

Subsection (G) provides for disposition of videotapes filed with the court.[40] Ownership remains with the proponent of the testimony. Thus, tapes may be reused, providing they are of acceptable quality. In general, the trial court may authorize the release of the tape upon final disposition of the cause, whether before trial, after trial when no appeal is filed, or after final appeal.

CONCLUSION

The successful *McCall* experiment and the resultant change in the Ohio Rules of Civil Procedure signal a radical change in the trial practice of the future. In the belief of some, the videotape trial offers advantages over conventional trial procedure, which not only aid in the relief of overburdened urban dockets, but which also significantly improve upon the administration of justice. The jury's task is simplified and made realistic by requiring the jury only to concentrate upon and remember all of the evidence presented to it. The psychological impossibility of selectively forgetting upon demand no longer plays a part in videotaped jury trials. Not only will time be saved at almost every step up to and through trial, but also courtroom histrionics for which the legal profession is not infrequently admonished will be totally eliminated. Testimony can be gathered and preserved when it promises the maximum value. The court has increased opportunity to weigh the merits of objections and motions in making its rulings. Attorneys will not suffer from extraneous pressures emanating from the imperative to make extemporaneous decisions of trial strategy and tactics while in the heat of a courtroom contest. Witnesses' testimony will be elicited in an atmosphere more conducive to the telling of truth in a natural, more relaxed manner. Appellate courts can supervise the discretionary power of the lower courts more effectively. These are but a few of the reasons why the videotape trial promises improvements to traditional fact-finding methods. In view of the many profits to be realized by this new trial concept, one legal commentator

[39] *Id.* at 15(F).
[40] *Id.* at 15(G).

has flatly predicted the inevitability of the widespread use of the videotape trial in the future.[41]

At present, the concept remains in its infancy. However, the adoption of the rule changes in Ohio may well mark the end of the beginning and introduce a new era in trial practice. Certainly, limited substitutional uses of videotaping in the conventional trial format are on the rise. Whether the preemptory use of videotaping — using recorded testimony in lieu of live witnesses for the entire trial — will eventually become the rule throughout the country cannot as yet be determined. However, in view of the advantages it offers and the fact that it is but a small logical step from the use of videotape for depositions, demonstrative evidence, jury views, and so forth (as is now rapidly becoming the case), to the use of videotape for the entire trial, the merits and full implications of the idea must be explored now. Certainly, it is an alternative to the present system which has proved itself workable, and, therefore, has earned the commitment of our full attention and critical scrutiny. Even at this early stage in its development the videotape trial has worked well. With the imaginative aid of the legal community, it could work far better in the future.

[41]Morrill, *supra* note 20, at 239.

APPENDIX

SUPERINTENDENCE RULE 10

VERBATIM TRANSCRIPTS; RECORDING DEVICES

Proceedings before any court, proceedings before a grand jury, and discovery proceedings may be recorded by stenographic means, by phonogramic means, by photographic means, by the use of audio electronic recording devices, or by the use of video recording systems.

Proceedings in any court which are recorded on videotape need not be transcribed into written form for the purposes of appeal. The videotape recording constitutes the transcript of proceedings as defined in App. R. 9(A) and Sup. R. 15(H)3. A transcript of proceedings transcribed on videotape shall be transmitted in its entirety as a part of the record.

Transcripts of proceedings transcribed on videotape will be filed with the clerk of the trial court at the conclusion of the trial. Transcripts of proceedings transcribed on videotape and other original records of transcript of proceedings shall be maintained in the trial court in the manner directed by the trial court until the case is finally terminated.

(Effective January 5, 1973)

SUPERINTENDENCE RULE 11

IMPROPER PUBLICIZING OF COURT PROCEEDINGS

Broadcasting, televising, recording, or taking photographs in the court room and area immediately adjacent thereto during sessions is prohibited, except that a trial judge may authorize:

(a) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration, or

(b) The use of electronic or photographic means for such other purpose as may be authorized by the procedural or superintendence rules of the Supreme Court of Ohio.

Any violation of this rule shall be considered a contempt of the trial court and punishable as such.

(Effective January 5, 1973)

SUPERINTENDENCE RULE 15

TESTIMONY AND OTHER EVIDENCE RECORDED ON VIDEOTAPE

(A) This rule shall apply to all trial courts of record in this state in the reception and utilization of testimony and other evidence recorded on videotape and to all appellate courts in this state in the review of cases in which the Record on Appeal contains testimony or other evidence transcribed on videotape for use at the trial or where the transcript of proceedings, if any, is transcribed on videotape.

(B) *Depositions.*

1. *Authority.* Civ. R. 30 (B) (3) permits a party taking a deposition to have the testimony recorded by other than stenographic means which would include a recording of the testimony on videotape (hereafter referred to as a videotape deposition).

2. *Notice.* The taking of a videotape deposition is subject to the requirements of Civ. R. 30 (B) (3) regarding notice specifying the manner of recording, preserving and filing of the videotape deposition, but it shall be sufficient in this regard if the notice specifies that the videotape deposition is to be taken pursuant to the provisions of Sup. R. 15 regarding the recording, preserving and filing of the videotape deposition.

3. *Officer.* The officer before whom a videotape deposition is taken

shall be one of those officers enumerated in Civ. R. 28. Upon the request of any of the parties, the officer shall provide, at the cost of the party making the request, a copy of the deposition in the form of a videotape, an audio recording, or a written transcript.

4. *Submission to witness.* When the videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties.

5. *Certification.* The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by him and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived his right to a showing and examination of the videotape deposition, the witness shall also sign the certification.

6. *Filing.*

(a) *In absence of objections.* If no objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the cerification, shall be filed by the officer with the clerk of the trial court upon the request of any of the parties in accordance with Civ. R. 30 (F) (1) and notice of its filing shall be given as provided in Civ. R. 30 (F) (3).

(b) *If objections have been made.* If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted by the officer to the trial judge upon the request of any of the parties within ten days after its recording or within such other period of time as the parties may stipulate, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose. For the purpose of ruling on the objections, the trial judge may view the entire videotape recording, view only those parts of the videotape recording pertinent to the objections made, or he may listen to an audiotape recording submitted in lieu of the videotape recording. The trial judge shall rule on the objections prior to the date set for the trial of the action and shall return the recording to the officer with notice to the parties of his rulings and of his instructions as to editing. The editing shall reflect the rulings of the trial judge and shall remove all references to the objections. The officer shall then cause the videotape to be edited in accordance with the Court's instructions and shall cause both the original videotape recording and the edited version of that recording, each clearly identified, to be filed with the clerk of the trial court.

7. *Storage.* Each trial court shall provide secure and adequate facilities for the storage of videotape recordings.

8. *Inspection or viewing.* Except upon order of the trial judge and upon such terms as he may provide, the videotape recordings on file with the clerk of the trial court shall not be available for inspection or viewing after their filing and prior to their use at the trial of the cause or their disposition in accordance with this rule. The clerk may release the videotape to the officer taking the deposition, without the order of the trial judge, for the purpose of preparing a copy at the request of a party as provinded [sic] at paragraph 3.

9. *Objections at Trial.* The effectiveness of a videotape deposition is greatly increased when all of the objections have been ruled upon, following the procedures set forth in this rule, prior to the time of trial. If, however, an objection is made at the time of trial which objection has not previously been waived pursuant to Civ. R. 32 (D) (3) or previously raised and ruled upon, such objection shall be made before the videotape deposi-

tion is presented and shall be ruled upon by the trial judge in advance of that presentation. If such objection is sustained, that portion of the videotape deposition containing the objectionable testimony shall not be presented to the jury.

(C) *Entire Trial Testimony and Evidence.*

1. *Authority.* Civ. R. 40 permits all of the testimony and such other evidence as may be appropriate to be presented at the trial of a civil action by videotape. Civ. R. 40 is limited to cases where the *entirety* of the testimony and appropriate evidence is presented on videotape. Civ. R. 40 does not contemplate treating the entirety of the testimony as a collection of individual depositions. When Civ. R. 40 is invoked and all of the testimony is recorded on videotape, the videotape recordings shall be the exclusive medium of presenting testimony without regard to the availability of the individual witnesses to testify in person. The limitations placed upon the use of depositions do not apply when the entirety of the testimony is recorded on videotape pursuant to the authority of Civ. R. 40.

2. *Invoking Civ. R. 40.* The entire testimony and appropriate evidence may be presented by videotape recording under agreement between or among all of the parties and with the consent of the trial judge. In an appropriate case, having due regard for the costs involved, the nature of the action, the nature and extent of the testimony, and after consultation with the attorneys representing the parties to the action, the trial judge may order the recording of all of the testimony on videotape.

3. *Procedure.* Unless clearly inapplicable, the provisions relating to the taking of a videotape deposition shall apply to the recording of the entirety of the testimony on videotape. The order of the taking of the testimony of the individual witnesses and the order of the presentation of that testimony shall be at the option of the proponent. In ordering, or consenting to, the recording of all of the testimony on videotape, the trial judge shall fix a date in advance of the day assigned for trial by which time all of the recorded testimony must be filed with the clerk of the trial court.

4. *Objections.* All objections must be made and ruled upon in advance of the trial of the cause and no objections to any of the testimony may be entertained during the presentation of the testimony. Edited copies of all the videotape recordings shall be made as may be required to eliminate all references to objections and to reflect the rulings of the trial judge on the objections made.

5. *Presence of counsel and trial judge.* The counsel for the parties and the trial judge shall not be required to be present in the courtroom when the recorded testimony is played to the jury. The trial judge shall not leave the courtroom during the playing of the recorded testimony without admonishing the jurors as to their duties and responsibilities and without leaving the jurors in the charge of a responsible official of the court. The trial judge shall remain within easy recall and shall bear the same duties and responsibilities as if he were physically present in the courtroom.

(D) *Use of Electronic Devices for the Transcribing of Verbatim Transcripts of Proceedings.*

1. *Authority.* Superintendence Rule 10 permits the use of electronic devices as a means of transcribing any court or grand jury proceedings.

2. *Determination of transcribing medium.* The trial judge, in the case of trial proceedings, or the administrative judge, in the case of grand jury proceedings, in exercising his authority over the operation of his court, may order the utilization of any means authorized by Superintendence Rule 10 for preserving the proceedings.

3. In lieu of requesting a copy of the transcript of proceedings, or portion of it, a party may view the transcript of proceedings on file with the clerk of the trial court or the clerk of the court of appeals as may be applicable.

4. Reference to a particular portion of a transcript of proceedings on videotape shall include reference to the event, the number of the reel of tape on which it is recorded, and the elapsed time counter reading.

(E) *Equipment.*

1. *Standard.* To minimize the incompatibility of equipment, the IEAJ Standard, the Japanese Standard one-half inch videotape specifications together with specifications for recording and play back equipment, is specified as the standard for use in the recording of testimony and other evidence on videotape for introduction in the trial courts of this state. If a party records testimony on videotape which is not compatible with the established standard, the party shall be responsible for the furnishing of reproduction equipment or for conversion to the established standard, all of which shall be at the cost of the party and not chargeable as costs in the action.

2. *Provision.* Each trial court shall make provision for the availability of play back or reproducing facilities. As may be appropriate, the trial court may purchase the equipment, may lease the equipment, or may contract for the furnishing of equipment on the occasions of need for the equipment. In the exercise of each of the specified [sic] options, the trial court shall provide for the adequate training of an operator from within the personnel of the court, or for the services of a competent operator from some other source.

3. *Minimum equipment.* As a minimum, facilities shall consist of a videotape player and one monitor, having at least a 14 inch screen. Color facilities shall not be required. Where the trial judge relies upon the two track audio cassette system for ruling upon objections made in the recording of testimony on videotape, the trial court may purchase, or otherwise acquire the modified equipment used in playing the soundtrack recording of the testimony and recording the rulings of the trial judge.

4. *Maintenance.* Proper maintenance of equipment is essential. The trial court shall take all reasonable steps to assure that the equipment is maintained within the operating tolerances. The trial court shall provide for competent regular maintenance of equipment which is owned or leased by the court, including the running of a standard test tape at least once every three months.

(F) *Costs.*

1. *Depositions.*

(a) The cost of videotape, as a material, shall be borne by the proponent.

(b) The reasonable cost of recording the testimony on the videotape shall be treated as costs in the action.

(c) The cost of playing the videotape recording to the jury in the course of the trial shall be treated as a general cost of the operation of the trial court.

(d) The cost of an audio reproduction of the videotape recording soundtrack used by the trial court in ruling on objections shall be treated as costs in the action.

(e) The cost of playing the videotape recording for the purpose of ruling upon objections shall be treated as costs in the action.

(f) The cost of producing the edited version of the videotape recording shall be treated as costs in the cause, provided that the cost of the

videotape, as a material, shall be borne by the proponent of the testimony.

(g) The cost of a copy of the videotape recording and the cost of an audio tape recording of the videotape soundtrack shall be at the expense of the party requesting the copy.

2. *Civ. R. 40 testimony.*

(a) The cost of the videotape, as a material shall be borne by the proponent of the testimony.

(b) The cost of copies for the benefit of the parties shall be borne by the requesting party.

(c) All other cost shall be costs of the action allocated between or among the parties as required by law as may be discretionary with the court.

3. *Electronically prepared Transcripts of Proceedings.*

(a) The cost of copies of the transcript of proceedings or such parts thereof as may be deemed necessary by a party for his use shall be borne by the requesting party or as provided by law.

(b) The cost of viewing a transcript of proceedings transcribed on videotape, as provided for in Sup. R. 15(D)3, shall be borne by the party requesting it or as provided by law.

(c) All other costs shall be costs of the action and payment shall be allocated by the court.

(G) *Disposition of Videotapes Filed with the Court.*

1. *Ownership.* The ownership of the videotape used in recording testimony shall remain with the proponent of the testimony. Videotape may be reused for the recording of testimony, but the proponent shall be responsible for the submission of a recording of acceptable quality.

2. *Release of videotape recordings.*

(a) The trial court may authorize the clerk of the court to release the original videotape recording and the edited videotape recording to the owner of the videotape:

(i) upon the final disposition of the cause when no trial is had.

(ii) upon the expiration of the appeal period following the trial of the cause, provided no appeal is taken.

(iii) upon the final determination of the cause, if an appeal is taken. Provided, however, that if the testimony is recorded stenographically by the court reporter during the playing of the videotape recording to the jury, or to the court sitting without a jury, the videotape recordings may be returned to the proponent upon disposition of the cause following the trial.

(b) The trial court's order of release shall be by journal entry.

(H) *Definitions.* For the purposes of these Superintendence Rules the following definitions apply:

1. *Record.* The record consists of all papers and exhibits therto filed in any court, the transcript of proceedings, or excerpts thereof, if any, including exhibits, and certified copies of the docket and journal entries prepared by the clerks of the various courts.

2. *Original Record.* The originals of all items which are a part of the Record.

3. *Transcript of Proceedings.* The end product of whatever medium used to preserve the content of proceedings in a trial court.

4. *Transcribe.* The process of preserving the content of oral proceedings or the process of transferring the content of oral proceedings from one authorized medium to the same or any other authorized medium of preservation.

5. *Transcription.* A copy, either in the same medium as the original or in any other authorized medium of reproduction, of an original transcript of proceedings.

(Effective September 1, 1972, *as amended,* January 5, 1973).

INDICATORS OF MANAGERIAL CONSCIOUSNESS IN AN URBAN JUDICIAL BUREAUCRACY

BY JAMES A. GAZELL*

INTRODUCTION

> WHAT can be done to make certain that civil conflict is resolved in the peaceful arena of the courtroom and that criminal charges lead to justice for both the accused and the community?
>
> We must make it possible for judges to spend more time judging, by giving them professional help for administrative tasks . . . .
>
> We have to find ways to clear the courts of the endless stream of "victimless crimes" that get in the way of serious consideration of serious crimes . . . .
>
> We should open our eyes — as the medical profession is doing — to the use of paraprofessionals in the law. Working under the supervision of trained attorneys, "parajudges" could deal with many of the essentially administrative matters of the law, freeing the judge to do what only he can do: to judge . . . . In addition we should take advantage of many technical advances, such as electronic information retrieval, to expedite the result in both new and traditional areas of the law . . . .
>
> And I endorse the concept of a suggestion made by Chief Justice [Warren E.] Burger: the establishment of a National Center for State Courts. This will make it possible for state courts to conduct research into problems of procedure, administration and training for state and local judges and their administrative personnel. It could serve as a clearinghouse for the exchange of information about state court problems and reforms.[1]

This recent comment by President Richard M. Nixon exemplifies the growing inclination of present and former public officials,[2] government commissions,[3] scholars,[4] and the mass media[5]

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1 Nixon, *Reforming the Administration of Justice*, 57 A.B.A.J. 422-24 (1971).

2 *See, e.g.*, R. CLARK, CRIME IN AMERICA 196-200 (1970); Burger, *Deferred Maintenance*, 57 A.B.A.J. 425 (1971); Burger, *The State of the Federal Judiciary* — 1971, 57 A.B.A.J. 855 (1971); Tydings, *Modernizing the Administration of Justice*, 50 JUDICATURE 258 (1967); Warren, *New Discipline: Judicial Administration*, 4 TRIAL 9 (1967-68).

3 *See, e.g.*, NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, THE REPORT OF THE NATIONAL ADVISORY BOARD ON CIVIL DISORDERS 183-94 (1968); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 125-54 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 80-91 (1967).

4 *See, e.g.*, J. CAMPBELL, J. SAHID & D. STANG, LAW AND ORDER RECONSIDERED 554-73 (1970); K. DOLBEARE, TRIAL COURTS IN URBAN POLITICS

to view trial courts as bureaucracies whose maintenance rests considerably on their managerial capability. This view arises because, especially in urban areas, the federal and state trial courts have failed to exhibit sufficient managerial efficiency in solving such critical problems as the mounting congestion of criminal and civil cases, a malady that threatens to immobilize this middle sector of the justice system funnel[6] (see figure 1).

This article, finished in June 1972, explores the existence of management consciousness in judicial organizations. Because judges are the traditional court managers, the study, conducted in September-October 1971, focuses on them. Forming the basis of the article is an investigation of the first part of a three-part managerial consciousness model which posits how judicial organizations maintain themselves. This model suggests that (1) the acquisition and degree of managerial consciousness varies directly with the gravity of the internal problems and external pressures confronting an organization; (2) this consciousness results in substantial changes in judicial operations to alleviate the intra-organization and extra-organization pressures; (3) the

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2-3 (1967); J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 2-28 (1969); E. FRIESEN, E. GALLAS & N. GALLAS, MANAGING THE COURTS 1-22 (1971) [hereinafter cited as MANAGING THE COURTS]; H. JAMES, CRISIS IN THE COURTS viii, 22, 25 (1967); J. JENNINGS, THE FLOW OF ARRESTED ADULT DEFENDANTS THROUGH THE MANHATTAN CRIMINAL COURT IN 1968 AND 1969 iii, v, 1-31 (1971); J. KLONOSKI & R. MENDELSOHN, THE POLITICS OF LOCAL JUSTICE 5-7 (1970); H. ZEISEL, H. KALVEN & B. BUCHOLZ, DELAY IN THE COURT 71-222 (1959); E. Gallas & N. Gallas, *Symposium on Judicial Administration*, 31 PUB. AD. REV. 111-43 (1971).

[5] *See, e.g.*, Larsen, *Why The Courts Are Clogged*, 13 SAN FRANCISCO 50-52 (1971); Mills, *Nothing To Do With Justice*, LIFE, Mar. 12, 1971, at 57-60, 62-66, 68; Star, *Jam-Up: Crisis in Our Criminal Courts*, LOOK, Mar. 23, 1971, at 32-34, 39; *Action to Help Clear Logjam in Courts*, U.S. NEWS & WORLD REP., Jan. 11, 1971, at 65; *As I See It*, FORBES, July 1, 1971, at 21-23; Interview with Chief Justice Warren E. Burger, U.S. NEWS & WORLD REP., Dec. 14, 1970, at 32-45; *What's Wrong with the Courts: the Chief Justice Speaks Out*, U.S. NEWS & WORLD REP., Aug. 24, 1970, at 68-71; *Justice in America*, COLUMBIA BROADCASTING SYSTEM, INC., televised, Apr. 20, May 18, June 15, 1971 (three part series).

[6] A. BLUMBERG, CRIMINAL JUSTICE 70 (1967); D. EASTON, THE POLITICAL SYSTEM 96-100 (1953); D. EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 21-33 (1965); J. KLONOSKI & R. MENDELSOHN, *supra* note 4, at xviii; T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 43-51 (1962); R. QUINNEY, CRIME AND JUSTICE IN SOCIETY 12-14 (1969); G. SCHUBERT, JUDICIAL POLICY-MAKING 105-07 (1965); E. SCHUR, LAW AND SOCIETY 180 (1968); I. SHARKANSKY, PUBLIC ADMINISTRATION 4-9 (1970); CRIME AND DELINQUENCY IN CALIFORNIA 1969 at 39, 66, 76, 85, 87, 97, 105, 106; Elden, Systems Analysis Decision Theory, and the Behavioral Approach in the Study of Jurisprudence 5-12 (unpublished masters thesis, San Diego State College, 1968).

FIGURE 1 A Funnel Model of a Typical Criminal and Civil Justice System: State Trial Court Level[7]

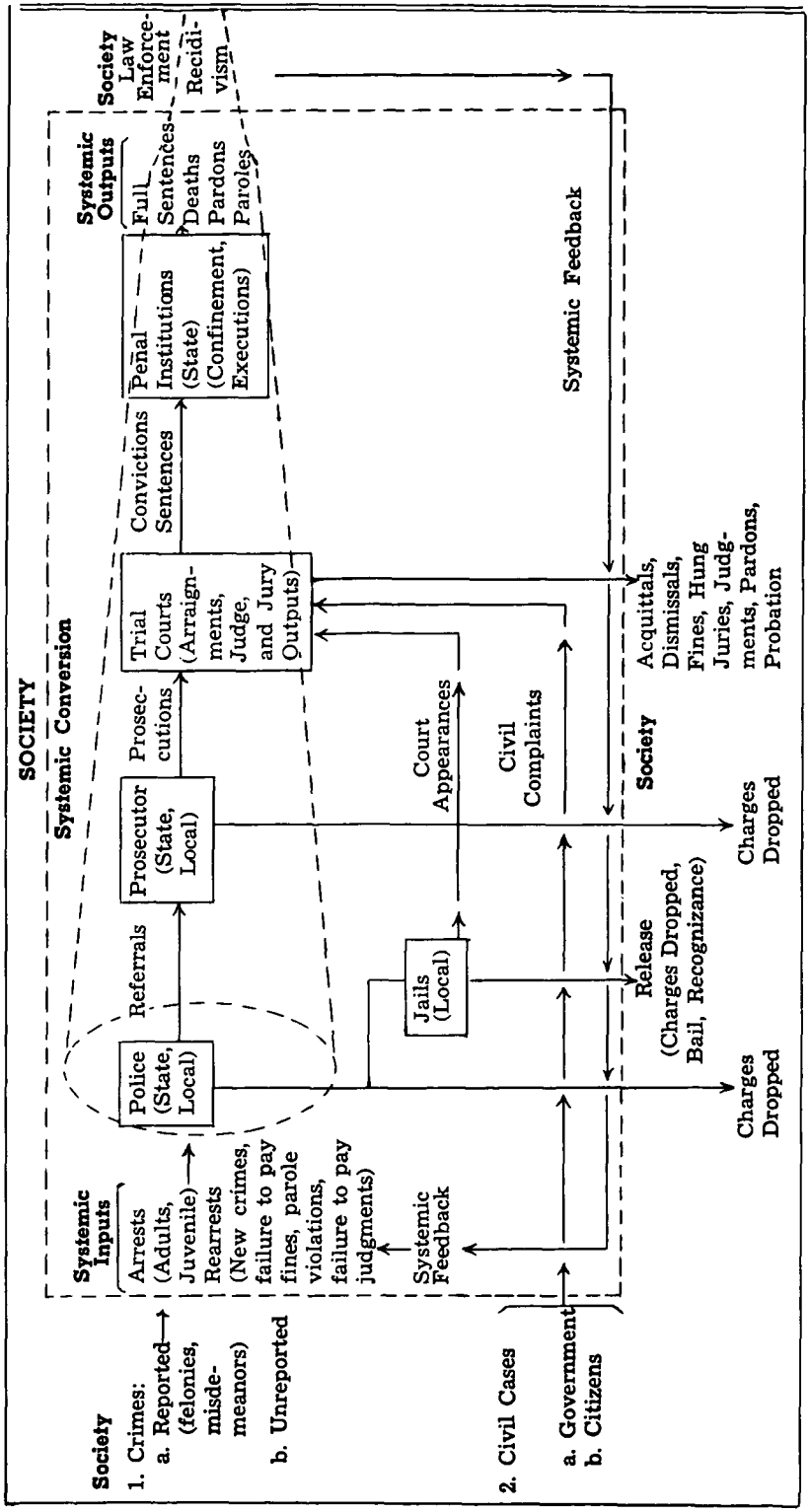
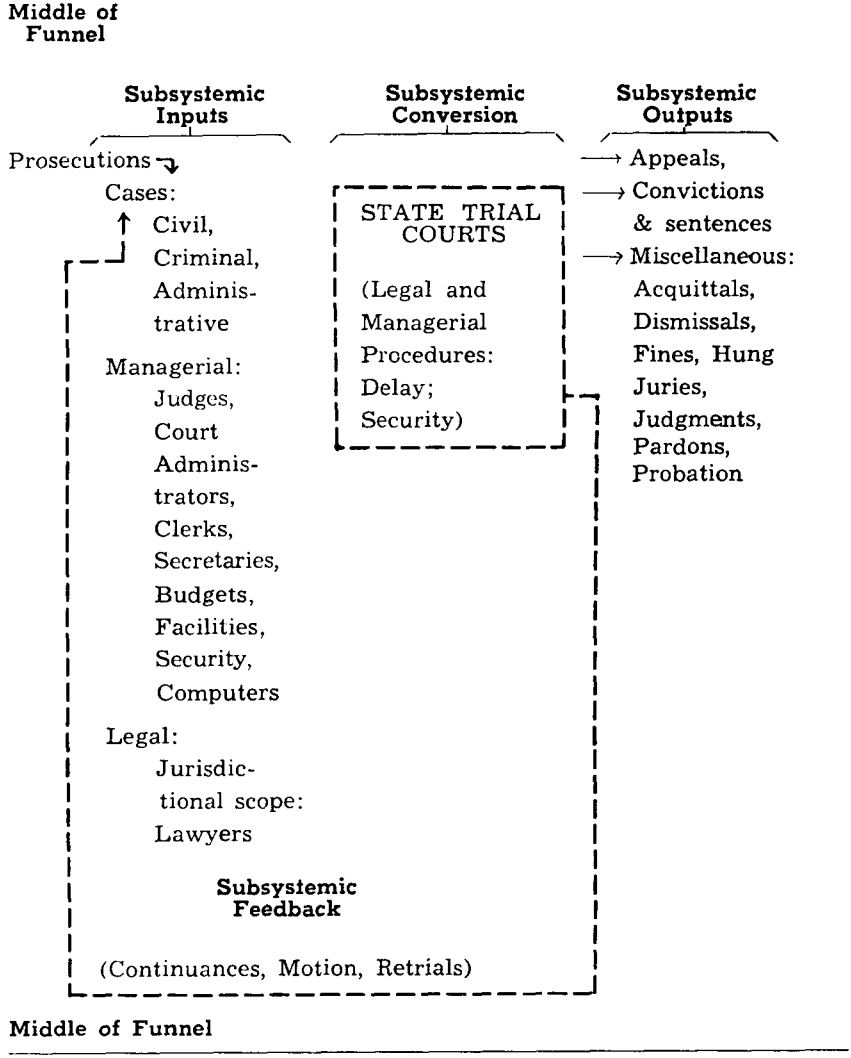


FIGURE 2 A Typical Judicial Subsystem: Within the Justice Funnel, State Trial Court Level[8]



changes, in correcting or ameliorating the problems, create less serious troubles which further sharpen the managerial acumen of judges as the pattern is repeated. Parts (2) and (3) are presented here to demonstrate the importance of managerial consciousness if judicial actors are to exert more control in problem-solving or if they are to more readily accept the stringent administrative leadership, the loss of considerable autonomy, and the drastic operational changes which may be required to assure continued survival of the organization.

[8] *Id.*

To test the acquisition and degree of managerial consciousness, this study analyzed the Superior Court of San Diego County, an urban trial court. This particular court was chosen for two reasons. First, this study wanted to analyze managerial consciousness only at the state trial court level because this is where the bulk of judicial business begins and ends.[9] Second, this court's internal problem of court delay and external pressure of threatened trial court consolidation are both typical of the forces which produce managerial consciousness in other urban trial courts. To determine the extent of judicial managerial consciousness regarding these two areas of delay and consolidation, this study requested that 20 veteran judges, of the 23 who held positions in this court in September-October 1971, complete a 14-question interview which measured the six areas of consolidation, specialization, discipline, delay, leadership, and ideology. The results of this study, which are analyzed in the following pages, describe six specific limitations in the acquisition and degree of managerial consciousness in the areas of discipline, delay, and leadership. These limits show that the lack of consciousness and the attitudes of these judges may prevent their efficient management of the problems which confront the judicial organization.

I. A Managerial-Consciousness Model

Although occasional signs of managerial consciousness in judicial milieus date from 1906,[10] only within the last few years has it risen sharply.[11] The motivation for this consciousness has stemmed mainly from two sources. One is the *aggravation of* at least nine *problems*: the inveterate delay besetting most state and urban trial courts;[12] a widespread fear that such delay helps to increase crime rates by reducing the prospect of swift and certain punishment for guilty defendants;[13] more frequent courtroom disruptions;[14] the incidence of recently concluded and

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[9] K. Dolbeare, *supra* note 4.

[10] W. Willoughby, Principles of Judical Administration 254-63, 338-50 (1929); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. Am. Jud. Soc'y 55 (1962); Pound, *Organization of Courts*, 10 J. Am. Jud. Soc'y 69 (1927).

[11] *See* sources cited notes 1-5 *supra*.

[12] D. Karlen, Judicial Administration: the American Experience 60-61 (1970).

[13] *See* sources cited note 5 *supra*.

[14] Mosk, *Justice in Violent Times*, 211 The Nation 431 (1970); Nordheimer, *Security Grows Tighter in Nation's Courtrooms*, N.Y. Times, Jan. 17, 1971, § 1, at 48, cols. 1-8.

pending trials with political overtones;[15] greater publicity for judicial difficulties;[16] a tendency of scholars to focus on the decisional and procedural aspects of courts rather than on the administrative facets;[17] a failure of courts to apply technology — especially computers — in order to raise the efficiency of judicial operations;[18] a neglect of such organizations, a condition that Chief Justice Burger recently described as "deferred maintenance;"[19] and broad cultural ferment[20] (see figures 1 and 2).

A second source motivating management consciousness is the extensive *scope of* the above-mentioned *problems* which embrace numerous urban trial court jurisdictions. Illustrative of this situation is the extent of delay in these organizations. With regard to civil-jury delay (an area for which the most data is publicly available), the average time from answer to trial ranges from more than 5 years in the Circuit Court of Cook County (Chicago), Illinois, to 2½ years in the District Court of Clark County (Las Vegas), Nevada. Falling between these two boundaries are the trial courts of New York City; Philadelphia and Norristown, Pennsylvania; Jersey City, New Jersey; Boston, Cambridge, Lawrence, Dedham, and Springfield, Massachusetts; and Detroit, Michigan.[21] With respect to the criminal case delay (a topic for which only scattered information is readily available), the lapse of time from filing to disposition of such actions usually averages less than 1 year. This situation predominates in all the cities of at least seven states: Illinois, Kansas, Maryland, Michigan, New Jersey, New

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[15] *See, e.g., Berrigan Jury Panel Nearing Completion,* L.A. Times, Feb. 6, 1972, § A, at 11; *Chicago 7 Cleared of Plot, 5 Guilty on Second Count,* N.Y. Times, Feb. 19, 1970, at 1, col. 2, at 14, cols. 1-8; *Deadlock by Jury Results in Seale-Huggins Mistrial,* N.Y. Times, May 25, 1971, at 1, cols. 1-3, at 27, cols. 1-8; *Ellsberg, Russo Charged in New Indictment on Pentagon Papers,* L.A. Times, Dec. 31, 1971, part 1, at 1, 6; *Manson, 3 Girls Sentenced to Die,* L.A. Times, Mar. 30, 1971, part 1, at 1, 3, 20; *Newton is Cleared of Charges in Slaying,* N.Y. Times, Dec. 16, 1971, at 53, cols. 3-5.

[16] *See* sources cited note 5 *supra.*

[17] MANAGING THE COURTS at 7-9.

[18] Adams, *The Movement Toward Modern Data Management in the Courts,* 23 U. FLA. L. REV. 250 (1971).

[19] Burger, *supra* note 2.

[20] A. TOFFLER, FUTURE SHOCK 25, 44-47 (1970).

[21] THE INSTITUTE OF JUDICIAL ADMINISTRATION, INC., CALENDAR STATUS STUDY — 1971, STATE TRIAL COURTS OF GENERAL JURISDICTION, PERSONAL INJURY JURY CASES, AUGUST 1, 1971, at vii-ix (1971).

Mexico, and New York.[22]

In explaining the time disparity for these two types of cases it should be noted that delay in criminal cases is generally far less severe than the delay in civil cases principally because of the statutory priority accorded to criminal cases. For example, criminal actions are moved more quickly because of short time limits (often 60 to 90 days) and the extensive use of negotiated pleas of guilty, which obviate lengthy trials.[23] However, because of these priorities, and the judicial personnel assigned to criminal cases, a reduction of delay in criminal cases often does not improve the overall delay problem because such a reduction usually results in an aggravation of delay in the civil docket.

Aggravated judicial problems of widespread incidence tend to motivate heightened managerial consciousness. At this point it is useful to elaborate on the model which links these problems with organizational maintenance in a judicial setting. This managerial-consciousness model[24] posits the following three ideas. First, the acquisition and degree of managerial consciousness varies directly with the gravity of the internal problems and external pressures confronting an organization. Internal difficulties include primarily a judicial resistance to substantial change, which is reinforced by at least four mechanisms: habit, an incessant stream of cases, traditionally broad discretion accorded to judges in their efforts to surmount their workloads, as well as a fear of diminished authority and status. The external pressures embrace four additional stimuli: growing population, advancing technology, a desire to emulate programs that succeed in other jurisdictions, and criticism from bar groups and the mass media. Second, this consciousness results in substantial changes in judicial operations to alleviate these internal problems and external pressures. Third, the accruing innovations correct or ameliorate these problems but spawn a set of less serious troubles, which further sharpen the managerial acumen of judges as they repeat the problem-solving pattern.

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[22] Based on data supplied to the author on May 4 and Nov. 30, 1971, by Mrs. Katherine Parkes, Librarian, The Institute of Judicial Administration, Inc., 40 Washington Square South, New York, N.Y. 10012.

[23] *See, e.g.*, A. BLUMBERG, CRIMINAL JUSTICE 28-29 (1967); BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA 1969, at 105 (1970); *Task Force Reports on the Judicial Component of the Criminal-Justice System in Cook County, Illinois*, Chicago Tribune, May 16-23, 1971, § 1 [hereinafter cited as *Task Force Reports*].

[24] W. BENNIS, ORGANIZATION DEVELOPMENT: ITS NATURE, ORIGINS AND PROSPECTS 22-23 (1969).

II. MANAGERIAL CONSCIOUSNESS IN AN URBAN TRIAL COURT

A. *Background Analysis*

The above model only suggests a theoretical framework for data-gathering;[25] it must be tested for evidence which confirms or denies the suggested theses. San Diego County was chosen because it epitomizes an expanding metropolitan area in three notable respects. First, its population has mounted during the last 50 years, particularly since 1940, as indicated in figure 3. By 1960, the San Diego metropolitan area ranked twenty-third nationally in population, a position that it maintains a decade later. In 1970, the only two California counties whose populations were larger were Los Angeles and Orange with 7,032,075 and 1,420,386 respectively.

FIGURE 3 Population of San Diego County[26]

Year:	Census	Percentage Increase	Population Rank in California
1920:	112,248	—	5th
1930:	209,659	86.8%	4th
1940:	289,348	33.2%	4th
1950:	556,808	92.5%	4th
1960:	1,033,011	85.5%	2nd
1970:	1,357,854	32.4%	3rd

Second, since the 1920's, the composite workload of the Superior Court of San Diego County has increased, especially within the last 30 years, almost as drastically as the population. However, due to a corresponding rise in the number of judgeships allocated to this court, the workload for each judge has fluctuated within a narrow range. In 1970, this organization ranked second in California with respect to its total filings and its number of judgeships[27] (see figure 4).

Third, despite sharp increases in population and in cumulative workloads, the extent of delay in the handling of criminal and civil cases has risen only at a gradual rate in this trial court (see figure 5).

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[25] O. GARCEOU, POLITICAL RESEARCH AND POLITICAL THEORY 4-5 (1968).

[26] CALIFORNIA SECRETARY OF STATE, 1970 CALIFORNIA ROSTER OF FEDERAL, STATE, COUNTY AND CITY OFFICIALS 110 (1970); THE 1972 WORLD ALMANAC AND BOOK OF FACTS 196 (1971).

[27] JUDICIAL COUNCIL OF CALIFORNIA, 1971 JUDICIAL COUNCIL REPORT 152-53 (1971).

FIGURE 4 Workload Changes in the Superior Court of San Diego County[28]

Year:	Total Filings	No. of Judgeships	Total Filings per Judgeship
1926:	4,969 (0.0%)	4 (0.0%)	1,242 (0.0%)
1930:	5,088 (2.5%)	5 (25.0%)	1,018 (—18.0%)
1940:	6,444 (26.7%)	6 (16.7%)	1,074 (+5.5%)
1950:	11,112 (72.4%)	8 (33.3%)	1,389 (+29.3%)
1960:	18,848 (69.6%)	19 (137.5%)	992 (—28.6%)
1970:	32,260 (71.2%)	25 (31.6%)	1,290 (+30.0%)

FIGURE 5 Scope of Criminal and Civil Case Delay in the Superior Court of San Diego County[29]

Year:	Criminal-Case Delay (Median-Months)	Rank in State	Civil-Case Delay (Average Months)	Rank in State
1963:	—	—	15.0 (0.0%)	7th
1964:	—	—	12.5 (—16.7%)	6th
1965:	—	—	16.7 (+33.6%)	3rd
1966:	—	—	16.3 (—2.4%)	7th
1967:	—	—	14.1 (—13.5%)	8th
1968:	2.7 (0.0%)	13th	17.6 (+24.8%)	7th
1969:	2.9 (+7.4%)	10th	18.8 (+6.8%)	7th
1970:	2.8 (—3.4%)	12th	18.3 (—2.6%)	7th
1971:	(Discontinued but probably below 2.8)	—	16.6 (+45.4%)	2nd

This result probably stems from the efficiency of this or-

[28] The Judicial Council of California was founded in 1926. CAL. CONST. art. 6, § 1a (1926). FIRST REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA TO THE GOVERNOR AND THE LEGISLATURE 56 (app. 1, 1927); THIRD REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA TO THE GOVERNOR AND THE LEGISLATURE 86-87 (apps. A-H, 1931); NINTH REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA TO THE GOVERNOR AND THE LEGISLATURE 17, 27-31 (1943); THIRTEENTH BIENNIAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA TO THE GOVERNOR AND THE LEGISLATURE 54-55 (1950); EIGHTEENTH BIENNIAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA TO THE GOVERNOR AND THE LEGISLATURE 198-99 (1961); 1971 JUDICIAL COUNCIL REPORT 153 (1971).

[29] *See* THE INSTITUTE OF JUDICIAL ADMINISTRATION, CALENDAR STATUS STUDY, PERSONAL INJURY JURY CASES 1-2 (1964); *id.* 1-2 (1965); *id.* 1-2 (1967); *id.* 1-2 (1969); *id.* 1-2 (1970); *id.* 2 (1971); JUDICIAL COUNCIL OF CALIFORNIA, 1971 JUDICIAL COUNCIL REPORT 122 (1971); JUDICIAL COUNCIL OF CALIFORNIA, 1972 JUDICIAL COUNCIL REPORT 106, 112 (1972).

ganization in expediting its business. However, three caveats temper this assessment. One qualification is the incompleteness of the delay information which dates from 1968 for criminal cases and from 1963 for civil cases. A second cautionary note is that, although one may garner data about the scope of the backlog for this court since 1926, such information is virtually worthless because one cannot validly equate backlog with delay. On the one hand, backlog is only the number of cases — criminal, civil, or both — that faces a court. The mere incidence of suits fails to divulge the length of time required to handle them. On the other hand, delay typically centers on the average or median duration of an action from its filing to its disposition. Under this distinction it is possible for some courts to face a large backlog but only a short delay whereas other judicial organizations may encounter the opposite situation.[30] A final limitation is that the data on the scope of delay in this jurisdiction suggest that its judges may be achieving consistent efficiency in the handling of criminal cases at the price of substantially increased delay in the adjudication of civil matters (see figure 5).

B. *Methodology*

A statement of the methodology employed in this study necessitates brief chronological attention to five requirements. First, the apposite indices were canvassed for previous studies of this institution in order to ascertain and to consider the possible adoption of their research techniques. However, there were no published articles that examined this court.[31] The nearest, recent studies have centered on examinations of trial court operations in Los Angeles,[32] San Francisco,[33] the state of California,[34] Chicago,[35] and New York City.[36]

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[30] MANAGING THE COURTS at 62-63; H. ZEISEL, *supra* note 4, at 44.

[31] Based on an exploration of the categories "Administration of Justice" and "Courts" in THE INDEX TO LEGAL PERIODICALS Vols. 1-16 (1926-72); and in AN INDEX TO LEGAL PERIODICALS LITERATURE Vols. 1-6 (1888-1937).

[32] J. HOLBROOK, A SURVEY OF METROPOLITAN TRIAL COURTS, LOS ANGELES AREA 3-404 (1956); THE SUPERIOR COURT OF LOS ANGELES COUNTY, REPORT OF THE SPECIAL JUDICIAL REFORM COMMITTEE FEBRUARY 1971, at vii-xvi (1971).

[33] THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON THE CRIMINAL COURTS OF SAN FRANCISCO, PART I, THE SUPERIOR COURT BACKLOG: CONSEQUENCES AND REMEDIES 12, 24, 26, 27, 30-34, 37-40, 43, 45-48 (1970); *id.* PART II, BAIL AND O.R. RELEASE 46-49 (1971); THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO, PART I — BASIC PRINCIPLES, PUBLIC DRUNKENNESS 46 (1971); *id.* PART II — SEXUAL CONDUCT, GAMBLING, PORNOGRAPHY 44-46, 55, 66 (1971).

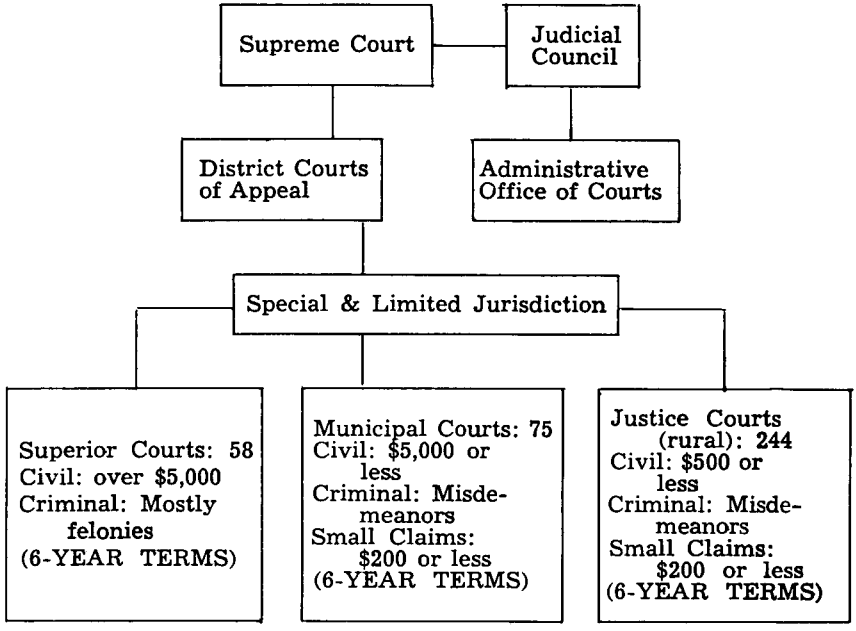
[34] CALIFORNIA LOWER COURT STUDY 1-125 (1971) [hereinafter cited as LOWER COURT STUDY]; CALIFORNIA UNIFIED TRIAL COURT FEASIBILITY STUDY 1-111 (1971) [hereinafter cited as UNIFIED TRIAL COURT STUDY].

[35] *Task Force Reports* at 1-2, 4.

[36] J. JENNINGS, *supra* note 4. *See also* J. JENNINGS, THE FLOW OF DEFENDANTS THROUGH THE NEW YORK CITY CRIMINAL COURT IN 1967, at 1-2, 7-13 (1970).

Second, the internal structure of this court must be delineated before it may be validly analyzed. In autumn 1971, the organization consisted of 25 judgeships,[37] of which 23 had been filled at the time of this survey. Since that time the number of judgeships for this court has risen to 28.[38] These officials are appointed by the governor of this state for 6-year terms, after which they may seek re-election[39] (see figure 6).

FIGURE 6 The California Judicial Subsystem[40]



A presiding judge is elected for a 1-year term by his peers who rotate among four divisions: civil (with 19 judges), criminal (with three judges), conciliation (with one judge), and juvenile (also with a lone judge) (see figure 7).

Third, in September and October 1971, 20 judges (87 percent) from a population of 23 consented to be interviewed with the stipulation that their names remain confidential. Although Ronald Reagan, the Governor of California, made two additional

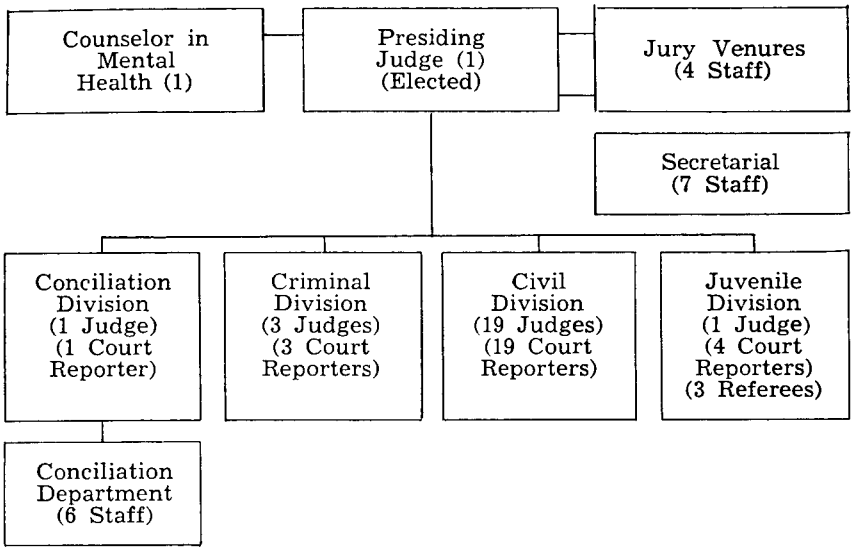
[37] CAL. GOV'T. CODE § 69595 (West Supp. 1972); JUDICIAL COUNCIL OF CALIFORNIA, 1972 JUDICIAL COUNCIL REPORT 112 (1972); JUDICIAL COUNCIL OF CALIFORNIA, 1971 JUDICIAL COUNCIL REPORT 152-53 (1971).

[38] CALIFORNIA SECRETARY OF STATE, CALIFORNIA ROSTER 1971-72, at 70 (1971).

[39] CAL. CONST. art. 6, § 16(c)-(d).

[40] CAL. CONST. arts. 5-11, art. 6, §§ 1, 3-5, 16(c); LEAGUE OF WOMEN VOTERS OF CALIFORNA, ADMINISTRATION OF JUSTICE 2 (1970); UNIFIED TRIAL COURT STUDY at 10.

FIGURE 7 Internal Structure of the Superior Court of San Diego County[41]



appointments to this bench shortly before the start of this survey,[42] the new judges were excluded because they had not served in this position for a minimum of 1 year and had not acquired extensive inside knowledge of the managerial problems facing this organization. However, the 87-percent sample size was certainly large enough to assure representativeness for the valid extrapolation of findings from the sample to the rest of the population.[43] Fourth, because the idea of managerial consciousness incorporates a melange of variables, this study sought to discover the extent of this attribute in this court by employing six organizational variables: consolidation, specialization, discipline, delay, leadership, and ideology.[44] Since two of these variables (delay and leadership) required the use of several questions for thorough analysis, the questionnaire consisted of 14 items.[45] The queries germane to each variable were put in mixed order in the questionnaire to reduce the possibility of re-

[41] Interview with Larry Adams, former Secretary to the Superior Court, now Jury Commissioner, San Francisco, 1971.

[42] *Reagan Names 2 to Superior Court, 3rd Judge Quits*, San Diego Union, Aug. 12, 1971, § B, at 1, 4.

[43] H. BOYD & R. WESTFALL, MARKETING RESEARCH 378-82 (2d ed. 1964); E. JONES, CONDUCTING POLITICAL RESEARCH 64-66 (1971).

[44] MANAGING THE COURTS at 36-40, 61-64, 139-45, 156-60, 173-88.

[45] *See* Apps. 1-3 *infra*.

sponse sets, *i.e.*, the inclination of respondents to answer items of the same kind in a fixed manner despite their content[46] (see Appendix 3). In addition 11 background questions were included: age, birthplace, religion, ethnic background, law school attended, year of admission to law practice, political party affiliation, public offices held before appointment to the current position, year of appointment to the bench, and the names of ancestors who served as judges or in other public offices in San Diego County.[47] The rationale for incorporating these additional items into this survey was an attempt to determine their possible impact on managerial attitudes.

Finally, the analysis of the garnered data consisted of four segments: tabulations for each item, the calculation of percentages, the determination of the mean (or average) as the best measure of central tendency among almost all of the responses, and the use of the highest correlation, if any, found between organizational and demographic variables (Pearson's r).[48]

C. *Principal Findings*:

The principal findings of this study gravitate around the six organizational variables of consolidation, specialization, discipline, congestion, leadership, and ideology which the 14 questions examine.

However, before presenting these findings, it is necessary to review the background data for the respondents in this court[49] in order to more thoroughly understand the results of this study.[50]

The following 10 demographic items furnish a composite picture of this institution and reveal a considerable degree of background uniformity among the interviewed judges. This uniformity is noteworthy because it implies that they have

[46] F. KERLINGER, FOUNDATIONS OF BEHAVIORAL RESEARCH, EDUCATION AND PSYCHOLOGICAL INQUIRY 47 (1964).

[47] *See* App. 4 *infra*.

[48] The correlations were made by Standard Program Library No. 40 (SPL 40), a program on correlations and factor analysis assembled by the Computer Center of San Diego State College. For two excellent sources on correlations see H. BLALOCK, SOCIAL STATISTICS 289 (1960); L. FREEMAN, ELEMENTARY APPLIED STATISTICS FOR STUDENTS IN BEHAVIORAL SCIENCE 89-102 (1965).

"Pearson's r" is a shorthand for Karl Pearson's product moment correlation. Its function is to discover interaction between two variables which are measured in different units. The Pearson r range is from -1.0 to $+1.0$, with negative readings indicating low correlation, positive readings indicating higher correlation, and readings in excess of $+.20$ or $+.25$ considered significantly correlated.

[49] *See* App. 4 *infra*.

[50] K. ARNOLD, CALIFORNIA COURTS AND JUDGES' HANDBOOK 314, 357-58, 361, 379, 429, 439, 443-44, 449, 457-58, 498, 544, 569, 574, 598-99, 603-04, 609; *id.* at 75-76, 222 (Supp. 1969).

reached approximately the same level of managerial consciousness. First, although their ages range from 44 years to 69, the largest category of interviewees (seven) fall in the age bracket of 56 to 60, with 56 as the mean. Second, most respondents (75 percent) are natives of states other than California and thus have migrated to the region. Third, a majority of interviewees (60 percent) failed to divulge their religious affiliation, if any. Of those persons who made this disclosure, Protestantism was the leading preference. Fourth, all members of this bench are white. Fifth, most respondents (80 percent) received their legal education from schools within California. Sixth, although the years that these persons became attorneys ranged from 1924 to 1954, the largest portion (nine) attained this position between 1946 and 1950 with 1943 as the mean year. Seventh, all the judges reached their present occupation through one of three career routes: private practice (50 percent), prosecutional work (30 percent), and previous judicial service, especially in a San Diego area municipal court (20 percent). Eighth, although the years during which these incumbents were appointed to this bench varied from 1947 to 1970, a large proportion of the appointments (11) were made from 1958 to 1966 (the tenure of California Governor Edmund G. Brown) with 1963 as the mean year. Ninth, among these interviewees there was virtually no lineage of judicial or other public service.[51] Finally, although the party identification of the respondents was evenly divided between Democrats and Republicans at the time of this research, the composition of this court has tilted decisively in favor of the Republicans with the re-election of Governor Ronald Reagan in 1970 and the expansion in the number of judgeships from 25 to 28.[52]

1. Court Consolidation

The first managerial variable centers on judicial consolidation, the merger of all trial courts within a particular area into a single organization empowered with exclusive, comprehensive, and original jurisdiction which is placed under the supervision of one official whose main task is the matching of case-

[51] There was one exception whose father was a prominent San Diego attorney for many years. *See* L. STANFORD, FOOTPRINTS OF JUSTICE IN SAN DIEGO AND PROFILES OF SENIOR MEMBERS OF THE BENCH AND BAR 84, 142-43 (1959).

[52] *See* JUDICIAL COUNCIL OF CALIFORNIA, 1972 JUDICIAL COUNCIL REPORT (1972); *Reagan, supra* note 42; *Reagan Names Harelson To Superior Court*, San Diego Union, Aug. 26, 1970, § B, at 1; *Reagan Names Leedy to Superior Court*, San Diego Union, June 17, 1970, § B, at 1; *Reagan Names San Diegans to Judgeship*, San Diego Evening Tribune, Mar. 6, 1972, § A, at 2; *Reagan Names Two Judges to Bench Here*, San Diego Union, Dec. 16, 1971, § B, at 6.

load requirements with the efficient deployment of judges.[53] This variable merited primary attention not only because the mere knowledge of its meaning implies a high level of managerial consciousness but also because such a change may be imminent in this state mainly as a result of the worsening congestion in these agencies.[54] The Judicial Council of California (a staff agency of the state supreme court which loosely supervises the California courts)[55] may soon recommend to the state legislature that the municipal and justice courts (the lower courts) in each of the 58 counties of California be combined into single tribunals with corresponding jurisdiction.[56] Although this partial consolidation is likely, the central issue may focus on the desirability of extending such consolidation to the superior courts.[57]

In brief, three plans will probably receive attention from the Judicial Council and the state legislature. The least drastic proposal would merge the lower courts into county courts and retain the superior courts. Both courts would feature direction by a single chief judge as well as centralized administrative services (such as security forces, reporters, and secretaries). A second plan reaches further by merging all trial courts into a single entity with two kinds of personnel: superior court judges and associate superior court judges. The associate superior court judges would consist of the present municipal and justice court officials. The new organization would also offer unified supervision and managerial services. A third plan, which in the recent past has garnered much legislative support, is the most drastic because it would combine all trial courts into one organization with a single chief judge and with centralized administrative services.[58]

In this political atmosphere, it was expected that the judges of the San Diego County Superior Court would be overwhelmingly critical of consolidation plans, regardless of their specific content. This supposition rested on three bases: the attitudes that other sources had found in their impressionistic encounters

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[53] UNIFIED TRIAL COURT STUDY at 7, 16, 60-61.

[54] LOWER COURT STUDY at 50, 69-72; UNIFIED TRIAL COURT STUDY at 45-47.

[55] CAL. CONST. art. 6, § 1(a).

[56] *Judicial Council Seeks to Reduce Court Congestion, Develop Uniform System of Judicial Administration*, 11 CAL. J. 337-38, 347 (1971).

[57] UNIFIED TRIAL COURT STUDY at 53.

[58] UNIFIED TRIAL COURT STUDY at 49-52.

with these officials,[59] the reluctance of these presently higher-court officials to handle the spate of typical municipal and justice court business (minor criminal and civil cases),[60] and a threat to the status of these judges who tended to view the lower courts as a training ground for judges wanting to advance to a superior court position.[61] However, when these respondents were asked about their attitude toward judicial consolidation (Question 1), the opposition to this idea only slightly exceeded the approval of it.[62]

At least four factors may account for this result. First, since the understanding of consolidation presumes a high degree of managerial consciousness, a substantial minority of judges may have attained such a degree of consciousness that they perceive its necessity for reducing criminal and civil case delay, for lowering expenses, and for achieving greater efficiency. A second possibility is a resignation to its inevitability in California. A third reason may be that some judges feel confident about dominating the operational patterns in a unified trial court apparatus. A fourth consideration is the impact of demographic variables, especially the year of an interviewee's admission to practice and his age, since the tendency among judges to favor trial court consolidation in California varies directly with these two characteristics. The correlations between the answers to this question and these two characteristics are 0.52 and 0.49, respectively.

2. Judicial Specialization

The second managerial variable focuses on specialization and consists of two facets: a division of labor and a compartmentalization of tasks.[63] To measure both aspects of this variable, this study used a pair of questions. One question centered on the first kind of specialization, the tendency of a judge to hear certain types of cases for an indefinite time. When asked how often judges should be shifted from one section of this court

[59] *See* the consolidated measures that California Assemblyman James A. Hayes (R. Long Beach) has made repeatedly which parallel the third plan described in this article. Cal. Assembly Const. Amend. No. 20 (intro. Jan. 20, 1972); Cal. A.B. 159 (intro. Jan. 20, 1972); Cal. A.B. 1400 (intro. Mar. 30, 1971); Cal. A.B. 2397 (intro. Apr. 3, 1970). *See also* Cal. Senate Const. Amend. No. 57 (intro. Mar. 16, 1972) by Alfred H. Song (D. 28th Dist.).

[60] UNIFIED TRIAL COURT STUDY at 53; *Judiciary Consolidation Opposed,* San Diego Union, Sept. 9, 1971, § A, at 4.

[61] UNIFIED TRIAL COURT STUDY at 53.

[62] *See* App. 3, Question 1 [hereinafter, all references to questions will refer to App. 3].

[63] W. BENNIS, AMERICAN BUREAUCRACY 4 (1970); MANAGING THE COURTS at 27, 157-58; M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 225-28, 261 (A. Henderson, T. Parsons transl. 1947).

to another (Question 2), the judges revealed a deep fissure in their opinions. One-half of the respondents said that they should be rotated among the four segments of this court (civil, criminal, conciliational, and juvenile) every 10-to-12 months. Implicit in this finding are the beliefs that each judge should complete a rotational cycle among the divisions of this court within a 4-year period and that this duration is the minimum span necessary for a judge to become conversant with the administrative problems of this organization. However, nearly as many judges (40 percent) failed to respond to this item. At least two factors may explain this dichotomy. One is a discrepancy in the managerial consciousness attained by these two groups of interviewees. The first group, which opted for rotation, may evidence this awareness because of the intermediate time period that they chose: long enough to permit a judge to understand the operational difficulties in each division but not so lengthy as to encourage boredom, stagnation, and myopia. The other group, which failed to respond to this question, may not have attained such a level of managerial consciousness. A second factor in explaining this dichotomy is party identification because the tendency to favor certain rotational time periods tended to vary directly with this demographic attribute. Generally, Democratic appointees inclined toward a fixed duration whereas Republicans preferred a noncommittal attitude. The correlation between the answers to this question and partisan affiliation was 0.41.

The second item on specialization (Question 6) centers on a delineation of basic tasks. When asked about the desirability of establishing another section (a sentencing division) to complement the other four sections of this court, the mean response (3.3) was one of uncertainty or mild opposition at most. Such an overall answer may divulge a high degree of managerial consciousness for three possible reasons. First, these judges may be reluctant to delegate a long-standing prerogative: the power to sentence. Second, they may believe that the creation of such a division may exert only a marginal pressure for reducing delay because a change may signify merely a redistribution of the same caseload. Third, since 80 percent of the interviewees replied to this query, it may validly be concluded that they regarded themselves as possessing sufficient administrative knowledge to comment on this subject. Finally, it should be noted that the tendency to favor the establishment of such a section correlates positively with age (0.50).

3. Discipline

The third organizational variable explores the forms of intra-organizational discipline that a judge may receive from his peers, especially a transfer from one section of this court to another. When the reasons for such shifts were sought (Question 3), most respondents claimed that this kind of change usually occurs for one of the following reasons: mounting congestion in another division, a personal preference to handle other types of litigation, or a reaction to overwork. All these professed reasons are nondisciplinary. Stated another way, these interviewees asserted that a judge in this court would seldom, if ever, be disciplined by this method even if he were involved in one or more of the following situations: excessive awards in civil bench trials, inordinate fining, excessive sentencing, insufficient awards in civil bench cases, lenient sentencing, local bar association opposition to a judge's decisions, partiality to defendants, a bias toward plaintiffs, too many decisions unpopular with fellow judges, an excessive number of decisions opposed by the presiding judge, numerous decisions resulting in public indignation, and too many decisions leading to criticism from other public officials. Unlike the conclusions for the first two managerial variables, the results for this one suggest the *first limit* concerning the extent of managerial consciousness developed by these judges. At least four considerations point toward such a finding. First, in a consolidated trial court apparatus, one function of a chief judge would be to define the precise circumstances that would govern the application of this informal sanction. Second, they may be satisfied that the use of peremptory challenges by litigants constitutes adequate discipline for wayward judges.[64] Third, the average percentage of respondents to this series of items (78.5 percent) is slightly lower than the corresponding items for the first variable (consolidation) and part of the second variable (specialization). Finally, the average correlation between a disposition toward practices invoking this sanction and the year of one's appointment to this bench is high enough (0.51) to intimate that newer members of this organization tend to favor more discipline over judicial conduct than do judges with more seniority.

4. Delay

The fourth managerial variable probes the criminal and civil case delay in this organization. Because this difficulty is the foremost administrative problem facing this court, the ques-

[64] CAL. CIV. PRO. CODE § 170.1-.7 (West Supp. 1972).

tionnaire includes four questions (4, 5, 8, and 10) to examine this characteristic.

Question 4 asks the respondents to rate 24 proposed remedies for delay according to their surmised efficacy in alleviating this trouble.[65] These proposed remedies fall into two basic categories: fundamental and accelerative. The fundamental denotes managerial changes that attempt to reduce the flow of certain cases (inputs) into this court whereas the accelerative category tries to speed the flow of cases through this bureaucracy by altering administrative procedures, *i.e.*, a quicker conversion of inputs into outputs (see figure 2).

Seven of the suggested remedies in Question 4 explore inputs of three kinds: case, legal, and managerial. The first of these inputs centers on criminal and civil litigation; the second, on law affecting the types of cases entering this court; and the third, on the personnel needed to operate this organization efficiently. One of the seven remedies delved into case inputs by seeking the judges' attitudes toward automobile accident compensation plans that emulate workmen's compensation. The mean response (3.0) was one of uncertainty probably because this item amounts to a proposal for change from the tort system to what are commonly called no-fault automobile insurance programs. Two of the seven remedies inquire about legal inputs: the abolition of jury trials generally and the elimination of such trials in personal injury cases. The average responses (3.4 and 3.1, respectively) approximated uncertainty most likely because these two items invoke far-reaching changes. The remaining four remedies of the seven consider managerial inputs: more court days, more judges, night court sessions, and the greater use of auditors or referees to assist judges. Although the mean responses to these items (4.4, 3.0, 3.3, and 2.9, respectively), denote uncertainty, except for strong opposition to additional court days, this indecision may stem from a suspicion that these inputs will exert only a marginal influence on the delay problem in this court.

Another 10 remedies of Question 4 examine acceleration of the judicial process, *i.e.*, accelerating conversion of system inputs into system outputs. When ranged on a continuum from most favorable to most hostile of four categories, the average responses of these judges to the items rank as follows: [1] more

[65] The numbers in parentheses throughout this section represent the means of the numbered evaluations in App. 3, Question 4. Questions were derived from H. ZEISEL, *supra* note 4, at 51-52, 85, 89, 98-99, 108, 119, 124, 128, 140, 151, 154, 166-67, 174, 180, 193, 198, 202, 209.

use of devices to increase settlements, *i.e.*, certificates of readiness to put cases on the court calendar (1.7), the greater use of impartial medical witnesses in civil cases (2.0), additional pretrial conferences (2.6), and payment of interest by losing parties to cover the delay from answer to verdict (3.9); [2] the adoption of split-trial procedures, *i.e.*, separating liability and damage proceedings (1.9); [3] the acceleration of jury trials by the increased use of four devices, *i.e.*, a judge's curbing of what he considers repetitive testimony (2.2), judicial participation in the examination of witnesses (2.4), a judge's assuming more rigorous charge of trials (2.5), and a judge's discouragement of what he regards as perfunctory objections (2.7); and [4] the more stringent supervision of judges by the presiding judge (2.9). These first 10 acceleration remedies were generally approved perhaps because they center on what judges may do through their individual efforts to mitigate delay and because these proposed changes may be fairly easy to implement.

However, the respondents professed uncertainty about the efficacy of three other conversion acceleration remedies: the use of inducements to spur more jury trial waivers, particularly the substitution of a comparative rather than a contributory negligence rule in exchange for such a waiver (3.0); a reduction of trial-scheduling gaps by changing from a calendar system to an assignment system (3.1); and clearing the docket of cases unready for trial at their initially scheduled time (3.3). For these remedies the uncertain responses may have resulted from the inability of these judges to foresee what impact these suggestions, if effected, might have on reducing delay in this organization.

Three other suggested remedies attracted unfavorable mean responses among these judges: the compulsory arbitration of small claims (3.9), an enlarged trial bar (4.1), and the use of a level court calendar — a more equitable distribution of court congestion by the disposition of older cases first (4.3). This opposition probably reflects doubts about the effectiveness of these proposed remedies in alleviating such delay.

The last remedy of Question 4 centers on the interviewee's attitudes toward weekly public disclosures of the caseload handled by each judge. One item sufficed to cover this area since decisions constitute the principal judicial output. The average response was one of uncertainty (3.3), a surprising conclusion because the judges could have been expected to oppose such reports, which might be later used against them, especially

during re-election. These judges may simply have been unable to forecast what pressure such reports would exert on judges to speed their work.

Finally, although the answers given for this collection of 24 possible remedies for delay uncover a considerable degree of managerial consciousness, its extent is not nearly as high as it was for the first three organizational variables of consolidation, specialization, and discipline. Two considerations support the conclusion that this question discloses a *second limit* in these judges' development of managerial consciousness. First, an average of only 71.5 percent of the respondents answered this question on delay — the lowest percentage of responses except for the replies to the second part of the consolidation variable. Second, the replies to these items did not correlate strongly with any of the demographic variables, with the possible exception of the year of a judge's appointment to the bench whose mean correlation with this group of queries was 0.36.

Unlike Question 4, which centers on judicial attitudes toward suggested devices for influencing the inputs, conversion process, and output of the court, Queston 5 focuses on judicial perceptions of delay in the middle (conversion or adjudicating) process, especially that caused by attorneys. The judges were asked about their views concerning what impact, if any, six types of counsel may have on the court time devoted to cases. The types of attorneys considered were client-paid attorneys, group-paid lawyers, out-of-town attorneys, county-salaried public defenders, counsel from the Legal Aid Society and similar organizations, and assigned counsel.[66] The mean response among the judges indicated that client-paid attorneys tended to hasten judicial proceedings (2.5); that the next four types exerted an uncertain impact on the case flow (3.0, 3.3, 3.3, and 3.6, respectively), but that assigned counsel tended to impede the conversion process (3.9). Based upon this data, two factors suggest the *third limit* in the interviewee's managerial consciousness. First, although 76.5 percent of the judges replied to this series of items, the high incidence of uncertain responses implies that the administrative distinctions requested were too subtle for them to make intelligently. Second, there were no important correlations between the answers to these items and background variables.

Question 8, the third question centering on the delay variable, is a continuation of Question 5. Of the eight items in this

[66] B. Cook, The Judicial Process in California 81-87 (1967).

question (all of which explore the conversion or adjudicating process), three (37.5 percent) were viewed by the respondents as serious causes of delay: the nonavailability of witnesses at trials (1.3), too many requests for continuances by the defense (1.4), and an excessive number of motions by the defense (1.5). The average reply for the remaining five items reflected the attitude that these items constituted minor causes of delay in this court: excessive requests for continuances by plaintiffs (1.7), too many prosecutional motions (2.0), an inordinate number of defense objections (2.0), a plethora of objections by the prosecution (2.0), and too many prosecutions (2.0).

The answers to this question imply a *fourth limit* on the degree of managerial consciousness validly attributable to these judges. This evaluation rests on the following considerations. First, although the respondents tend to ascribe delay more to the behavior of the defense than to the prosecution in criminal or plaintiff in civil cases, this preference is marginal because they have not generally reached a level of awareness that enables them to make the sensitive judgments required by these items. Second, the mean number of answers to this series of queries amounted to 66 percent — the lowest level for the questions considered so far. Third, the answers to these items failed to correlate strongly with any of the demographic variables with the possible exception of the year of a judge's appointment to the bench (0.39).

Question 10, the last one relating to the delay variable, focuses on a case input item because it probes the judges' perceptions as to whether the change of some felonies into misdemeanors (a recent alteration in the state penal code)[67] significantly reduced the workload in this court. In answering this question, the interviewees divided evenly in estimating the impact of this measure on the extent of delay in this organization. Like the previous question, number 8, this question suggests a *fifth limit* on the development of managerial awareness in the respondents. Two reasons largely account for this conclusion. First, 40 percent of the judges — the largest number so far — expressed uncertainty on this item. Second, the tendency toward indecision correlated highly with the increased age of the interviewee (0.56).

5. Leadership

This fifth organizational variable also contains four questions (7, 11, 13, and 14). This attribute merits as much attention

[67] CAL. PENAL CODE § 17(b)(5) (West Supp. 1972).

as the delay variable because competent judicial leadership is a *sine qua non* for alleviating the trial court delay. Such leadership entails the efficient management of eight other tasks besides delay: the court calendar (or case assignment process), data processing, finances, juries and witnesses, personnel, planning, public relations, and space.[68] All questions germane to this variation (except for Question 13) center on the main judicial executive in this organization, the presiding judge.

Question 7 seeks the interviewee's attitudes toward the best method for the selection of a presiding judge. The respondents unanimously favored the choice of this administrator by secret ballot, a continuation of the present mode. Obversely, no one favored the other two enumerated methods, appointment of this official by the Judicial Council of California[69] or by seniority. Nor did these respondents avail themselves of the opportunity to volunteer any other method. The replies to this question suggest a considerable degree of managerial awareness toward the salience of this variable. Two pieces of information buttress this finding. First, 90 percent of the judges answered this question. Second, the correlation of the responses to this item with the demographic characteristics was zero.

Question 11 seeks to ascertain the judges' views about the optimal tenure for this manager, the presiding judge. At present, although this official is elected by his peers for a 1-year term,[70] he is customarily re-elected for a second year because, as one judge commented, he needs approximately 1 year to learn the many facets of his role. Again, all the interviewees favored a de facto 2-year term for the presiding judge. Stated another way, no one favored an extension of this official's tenure to cover 3 or more years. Such a lengthened term might be a means to augment leadership skills, but the price for this change might be a diminution of his accountability to his peers. Furthermore, no one favored a tenure of less than 2 years, although that period would increase the peer accountability at the expense of reducing leadership skills. Finally, although the 100 percent response rate and the zero correlation between the answers to this query and the background attributes imply a high level of managerial consciousness, it is possible to be skeptical because a far longer term may be essential for this

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[68] H. JACOB, JUSTICE IN AMERICA 81-82, 139 (1965); D. SAART, MODERN COURT MANAGEMENT: TRENDS IN THE ROLE OF THE COURT EXECUTIVE 3-10 (1970).

[69] CAL. CONST. art. 6, § 1(a).

[70] CAL. RULES OF COURT 252-55 (West 1970)..

judicial leader to acquire expertise. An indefinite appointment by his peers or by the judicial council may be the eventual device to promote such skill, especially in a consolidated trial court apparatus.[71]

Question 14 tries to discover what the interviewees regarded as the most significant managerial abilities needed to fulfill the role of presiding judge. The judges who answered this question believed that the presiding judge should exhibit two principal qualities: the ability to organize the workload of this court and considerable seniority. However, this query uncovered the *sixth and final limit* in the development of managerial consciousness among these respondents because only half of the interviewees (the lowest response rate so far) completed this item and because the more recent appointees tended to check the listed attributes rather than leave this question blank. The correlation between a reply to this query and the year of a judge's appointment to this bench was mildly positive (0.32).

Question 13, the last question focusing on the leadership variable, shifts emphasis from the selection, tenure, and managerial traits of the presiding judge to a typology of the serious and minor administrative problems facing this official. This query consists of 20 managerial items culled from two noted sources.[72] On a mean basis, the respondents viewed only the task of case scheduling as critical (1.4). They perceived 13 other functions as significant: the assignment of judges (1.6), the maintenance of courtroom security (1.6), the continuation of rapport with fellow judges (1.8), evaluating practices and procedures (1.8), the keeping of good relations with the court staff (1.9), satisfactory public relations (1.9), the establishment and organization of divisions, departments, or districts (2.1), the setting up of court committees (2.2), the assessment of judicial competence (2.3), the facilitation of intra-organizational communications (2.4), the expansion of courtroom space (2.4), the garnering of appropriations (2.4), and the use of computers (2.4). Among the minor tasks perceived to be confronting the presiding judge are the remaining six: the maintenance of court records (2.5), the measurement of judicial output (2.5), the training of a court staff (2.5), budgeting (2.6), the recruitment of staff members (2.8), and the disciplining of judges (2.9). The answers to this group of items reveal much administrative consciousness among the respondents because 78 percent of

[71] LOWER COURT STUDY at 72-76; UNIFIED TRIAL COURT STUDY 93-99.

[72] *See* sources cited note 68 *supra*.

them, on the average, replied and because their inclination to answer varied directly with the year of their appointment to this bench (0.62).

6. Political Ideology

The sixth organizational variable centers on political ideology, which is germane to a consideration of managerial consciousness because extreme political beliefs may interfere with unbiased development of managerial consciousness. To analyze this variable, two questions (9 and 12), each of which contains numerous components, were employed. Question 9 asked whether, in these judges' views, the ethnic composition of the federal and state courts should be generally proportionate to the racial composition of the jurisdictional area. This question consisted of nine court types: the United States Supreme Court, the United States Courts of Appeal, the United States District Courts, the California Supreme Court, the California District Courts of Appeal, the superior courts in the state generally, the superior court of San Diego County, the municipal courts in the state generally, and the Municipal Court for the San Diego Judicial District. For all the judicial organizations listed, the average responses for each item tended toward political moderation as evidenced by the answers which varied within a narrow range from favorable to uncertain. Such middle-of-the-road views may reinforce the respondents' managerial consciousness by encouraging a pragmatic or technical outlook toward administrative problems rather than a political one. Two considerations support this assessment. First, 80 percent of the judges answered this question. Second, the inclination of the respondents to sanction this proposal varied directly with party affiliation (0.62) and age (0.58) in that proponents of this idea tended to be Democrats and young judges.

Question 12 represents a deeper probe into the impact of political outlooks on the growth of managerial consciousness among the interviewees. This query consists of 15 items to which favorable answers connote a liberal orientation; uncertain responses, a moderate outlook; and unfavorable replies, a conservative perspective.[73] Three items (20 percent) yielded mean responses classifiable as liberal: a disposition to support claimants in unemployment cases (1.7), an inclination to expand the scope of the first amendment to the United States Constitution (1.8), and a tendency to favor public employees in strike

[73] Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961).

cases (1.8). Of the 12 remaining sections of this question, the mean outlooks are near the middle of the response scale since their proclivity to favor consumers in sales-of-goods cases averages 2.0; the labor union in management cases, 2.0; the employee in injury suits, 2.0; the state government in tax cases, 2.3; the injured person in motor vehicle accident cases, 2.3; the tenant in landlord cases, 2.3; the wife in divorce cases, 2.3; the finding of a constitutional violation in criminal cases, 2.5; the support of college students in police cases, 2.6; the administrative agency in business regulation litigation, 2.8; the debtor in a dispute with a creditor, 2.8; and the defense in criminal cases, 2.8. This political moderation stems primarily from partisan affiliation. This conclusion is derived from the fact that the disposition toward more liberal answers correlates positively (0.57) with Democratic Party membership. Much of this centrism emanates from the Democratic judges who had been appointed by former California Governor Edmund G. Brown. However, as his successor, Ronald Reagan, replaces resigning Democratic appointees with Republicans[74] and as the size of this organization increases,[75] the ideological outlook of this court may become much more conservative, although probably not to such an extreme degree that the continued development of managerial awareness in this court would be seriously impaired. Finally, the finding of political centrism in this organization is tentative because the mean response rate for these items was only 56 percent of the judges. The low percentage probably stems from the sensitive nature of this query.

CONCLUSION

Three noted court management scholars have commented that "[T]he courts have not achieved the same measure of success as other bureaucracies have in terms of efficiency or in effectiveness in relating to clientele groups."[76] Increased managerial awareness among judges may foster such efficiency not only in the Superior Court of San Diego County but also in other state and federal trial courts. This article has sought to devise a managerial-consciousness model in order to explain how judicial organizations maintain themselves, particularly in an urban trial court setting. This model consists of three propositions. First, such awareness grows from the convergence of internal and external pressures on this bureaucracy. In the

[74] *See* sources cited notes 42, 52 *supra*.
[75] *See* JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 27.
[76] MANAGING THE COURTS at 20.

court examined in this article, the primary intrinsic force was the mounting delay in the handling of criminal and civil cases. The main extrinsic pressure was the increased likelihood of consolidation which would place this organization and the other trial courts in the state under centralized — and probably more stringent — direction. Both forces have become typical of what engenders managerial consciousness in other urban trial courts. To measure such awareness, this study employed six indicators: consolidation, specialization, discipline, delay, leadership, and ideology. In brief, the mean response was opposition to consolidation tempered by resignation to its eventual achievement. The judges favored a specialization of labor to a greater extent than a division of tasks because the former tends to encourage judicial expertise whereas the latter increases the probability of stagnation. The interviewees generally opposed a tightening of discipline over judicial conduct, a likelihood in a consolidated trial court apparatus. The respondents tended to favor an accelerative rather than fundamental approach to the problem of alleviating delay in this organization. Stated another way, they supported devices for speeding the flow of litigation through this subsystem within the justice process rather than seeking to curb some case inputs. Furthermore, the interviewees favored the perpetuation of the current leadership mode, for they professed general satisfaction with the selection and tenure of the presiding judge. Finally, they subscribed to an ideology of political centrism, which is consistent with the further development of managerial consciousness.

Although their outlooks toward the three organizational variables of consolidation, specialization, and ideology facilitate the continued maintenance of this trial court, their attitudes toward the remaining three variables may inhibit their ability to reduce delay and to adapt to a new judicial milieu, the consolidated court. Impelled by rising congestion and the promise of substantial reductions in judicial operating expenses,[77] trial court consolidation in California may be completed by the year 1976.[78] Accompanying such consolidation may be more rigorous discipline on judicial behavior and a far more powerful court leadership. Moreover, another concomitant may be a drastic approach to eliminate delay. Such a thrust may cut off numerous case inputs. Litigation centering on what are sometimes called vic-

[77] UNIFIED TRIAL COURT STUDY at 105-06.
[78] *See* UNIFIED TRIAL COURT STUDY at 60, 68-73.

timless crimes[79] (such as drunkenness, minor drug abuse, gambling, vagrancy, abortions, and the sexual behavior of consenting adults) may be eradicated. Supplementing this approach may be the greater use of plea-bargaining to expedite the flow of the remaining criminal cases through this subsystem.[80] Furthermore, numerous civil suits involving personal injuries and probate matters[81] may be removed from judicial organizations by what are commonly labeled as no-fault insurance programs[82] and by increased out-of-court settlements.

The second part of the managerial consciousness model suggests that the acquired managerial consciousness results in substantial changes to alleviate problems. With respect to this study, a heightened sense of managerial consciousness toward discipline, delay, and leadership might have enabled the judges in this court to exert more control over their internal and external problems by formulating and publicizing their own proposals for organizational changes to solve these problems. These proposals would have helped this organization to co-opt extrinsic pressures and to press its own ideas rather than to respond to the projects of other agencies, such as the judicial council in the state.

Finally, the third premise of the managerial-consciousness model states that the changes, in correcting the present problems, create less serious troubles which can be solved as the judges repeat this three-part process of the managerial-consciousness model. Thus, a heightened sense of managerial consciousness among trial court judges is a prerequisite for moving a step closer to the attainment of a more efficient judicial subsystem within the justice funnel (see figures 1 and 2). It is hoped this type of efficiency will result in a heightened sense of managerial consciousness that will allow the approximation of a goal recently stated by President Nixon:

> The ultimate goal of changing the process of justice is not to put more people in jail or merely to provide a faster flow of litigation, it is to resolve conflict speedily but fairly, to reverse the trend toward crime and violence, to reinstill a respect for law in all our people.[83]

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[79] N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 2-24 (1970).

[80] *See* sources cited note 23 *supra*.

[81] A Remark by Hon. W. Craig Biddle, a member of the California Assembly (R. Riverside County) as a participant in the Court Reform Panel at the California Conference of the American Society for Public Administration in San Diego, Cal., Feb. 19, 1972.

[82] *Illinois No-Fault Law Invalidation Upheld*, L.A. Times, Mar. 24, 1972, § 1, at 17; *State Bar Propose Modified No-Fault Insurance*, L.A. Times, Mar. 1, 1972, § 1, at 3.

[83] *See* Nixon, *supra* note 1.

APPENDIX 1

Organizational Variables:	Mixed Question Numbers:
1. Consolidation:	#1
2. Specialization:	#2, #6
3. Discipline:	#3
4. Delay:	#4, #5, #8, #10
5. Leadership:	#7, #11, #13, #14
6. Ideology:	#9, #12

APPENDIX 2

COVER LETTER

SCHOOL OF PUBLIC ADMINISTRATION AND URBAN STUDIES
SAN DIEGO STATE COLLEGE

Dear Judge .....:

As an associate professor of Public Administration and Urban Studies at San Diego State College, I have had a deep professional interest in judicial management, especially at the trial-court level. Three years ago I explored the managerial problems facing the Circuit Court of Cook County, Illinois. Now I need your assistance to examine the management operations of the Superior Court of San Diego County. Therefore, I would be most appreciative if you would please complete the accompanying questionnaires before your interviews with my research assistants (Mr. Marshall Bear, Mrs. Romney Cohen, and Mrs. June Kaiser) and me. Thank you.

Most respectfully,
James A. Gazell, Ph.D.
Associate Professor of Public
Administration and Urban Studies

APPENDIX 3

QUESTIONNAIRE (WITH TABULATED RESULTS)

For each of the following questions, please check the response that indicates your opinion most accurately.

1. What is your attitude toward consolidating the Superior, Municipal, and Justice courts of each county into a single trial court with exclusive, comprehensive, original jurisdiction?
(VARIABLE: CONSOLIDATION)

1—Strongly Favor	2—Favor	3—Uncertain	4—Oppose	5—Strongly Oppose	6—Blank	Total
4(20.0%)	2(10.0%)	4(20.0%)	4(20.0%)	4(20.0%)	2(10.0%)	20(100.0%)

Mean: 3.0

2. How often should judges in your court be shifted from handling one kind of cases to another?
(VARIABLE: SPECIALIZATION)

(1) Every 1-3 months	2 (10.0%)	> Mean: 3.5
(2) Every 4-6 months	0 (0.0%)	
(3) Every 7-9 months	0 (0.0%)	
(4) Every 10-12 months	10 (50.0%)	
(5) Longer (please specify)	0 (0.0%)	
(6) Blanks	8 (40.0%)	
Total:	20(100.0%)	

3. For what reasons are judges transferred from one division to another?
(VARIABLE: DISCIPLINE)

	Mean (M)	1—Always	2—Usually	3—Sometimes	4—Usually Not	5—Never	6—Blanks	Total
(1) Excessive awards in civil bench trials	4.9	0 (0.0%)	0 (0.0%)	0 (0.0%)	2(10.0%)	12(60.0%)	6(30.0%)	20(100.0%)
(2) Excessive fining	4.6	0 (0.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	10(50.0%)	6(30.0%)	20(100.0%)
(3) Excessive sentencing	4.6	0 (0.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	10(50.0%)	6(30.0%)	20(100.0%)
(4) Insufficient awards in civil bench trials	4.5	0 (0.0%)	2(10.0%)	0 (0.0%)	2(10.0%)	12(60.0%)	4(20.0%)	20(100.0%)
(5) Insufficient sentencing	4.1	2(10.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	10(50.0%)	4(20.0%)	20(100.0%)
(6) Local bar association opposition to decisions	4.6	0 (0.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	10(50.0%)	6(30.0%)	20(100.0%)
(7) Partiality to defendants	4.4	0 (0.0%)	2(10.0%)	2(10.0%)	0 (0.0%)	12(60.0%)	4(20.0%)	20(100.0%)

	M	1—Always	2—Usually	3—Sometimes	4—Usually Not	5—Never	6—Blanks	Total
(8) Partiality to plaintiffs	4.6	0 (0.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	10(50.0%)	6(30.0%)	20(100.0%)
(9) Requested due to overwork	3.4	2(10.0%)	2(10.0%)	4(20.0%)	4(20.0%)	4(20.0%)	4(20.0%)	20(100.0%)
(10) Requested due to preference for other kinds of cases	2.4	2(10.0%)	6(30.0%)	10(50.0%)	0 (0.0%)	0 (0.0%)	2(10.0%)	20(100.0%)
(11) Required due to congestion in other divisions	2.5	0 (0.0%)	8(40.0%)	10(50.0%)	0 (0.0%)	0 (0.0%)	2(10.0%)	20(100.0%)
(12) Too many decisions unpopular with fellow judges	4.1	0 (0.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	12(60.0%)	4(20.0%)	20(100.0%)
(13) Too many decisions unpopular with presiding judge	4.9	0 (0.0%)	0 (0.0%)	0 (0.0%)	4(20.0%)	14(70.0%)	2(10.0%)	20(100.0%)
(14) Too many decisions unpopular with the public	4.4	2(10.0%)	0 (0.0%)	0 (0.0%)	2(10.0%)	12(60.0%)	4(20.0%)	20(100.0%)
(15) Too many decisions unpopular with public officials	4.3	2(10.0%)	0 (0.0%)	0 (0.0%)	4(20.0%)	10(50.0%)	4(20.0%)	20(100.0%)

4. Below is a list of widely advocated proposals for reducing trial-court delay. Please rate them according to your estimate of their ability to reduce such delay.
(VARIABLE: DELAY)

	M	1—Excellent	2—Good	3—Uncertain	4—Poor	5—Very Poor	6—Blanks	Total
(1) Abolition of jury trials generally	3.4	2(10.0%)	4(20.0%)	2(10.0%)	2(10.0%)	6(30.0%)	4(20.0%)	20(100.0%)
(2) Acceleration of jury trials by:								
(a) Judge assumes more rigorous charge of cases	2.5	2(10.0%)	8(40.0%)	4(20.0%)	4(20.0%)	0 (0.0%)	2(10.0%)	20(100.0%)
(b) Judge curtails repetitive testimony	2.2	2(10.0%)	10(50.0%)	6(30.0%)	0 (0.0%)	0 (0.0%)	2(10.0%)	20(100.0%)
(c) Judge discourages perfunctory objections	2.7	4(20.0%)	2(10.0%)	4(20.0%)	2(10.0%)	2(10.0%)	6(30.0%)	20(100.0%)

	M	1—Excellent	2—Good	3—Uncertain	4—Poor	5—Very Poor	6—Blanks	Total
(d) Judge participates in the questioning of witnesses	2.4	6(30.0%)	2(10.0%)	6(30.0%)	0 (0.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(3) Automobile-accident compensation plans modeled after workman's compensation programs	3.0	2(10.0%)	4(20.0%)	6(30.0%)	0 (0.0%)	4(20.0%)	4(20.0%)	20(100.0%)
(4) Clearing the calendar	3.3	0 (0.0%)	2(10.0%)	2(10.0%)	0 (0.0%)	2(10.0%)	14(70.0%)	20(100.0%)
(5) Compulsory arbitration of small claims	3.9	2(10.0%)	0 (0.0%)	2(10.0%)	4(20.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(6) Elimination of jury trials in personal-injury cases	3.1	2(10.0%)	6(30.0%)	4(20.0%)	0 (0.0%)	4(20.0%)	4(20.0%)	20(100.0%)
(7) Enlarged trial bar	4.1	0 (0.0%)	0 (0.0%)	4(20.0%)	4(20.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(8) Inducements to increase jury-trial waivers (such as by using a comparative rather than contributory negligence rule in exchange for the waiver)	3.0	4(20.0%)	4(20.0%)	0 (0.0%)	0 (0.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(9) Leveled court calendar (more equitably distributing delay by refusing to accord preference to certain criminal and civil cases)	4.3	0 (0.0%)	0 (0.0%)	2(10.0%)	6(30.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(10) More court days	4.4	0 (0.0%)	0 (0.0%)	2(10.0%)	4(20.0%)	6(30.0%)	8(40.0%)	20(100.0%)
(11) More judges	3.0	2(10.0%)	2(10.0%)	2(10.0%)	2(10.0%)	2(10.0%)	10(50.0%)	20(100.0%)
(12) More stringent supervision of judges by presiding judges	2.9	2(10.0%)	6(30.0%)	4(20.0%)	4(20.0%)	2(10.0%)	2(10.0%)	20(100.0%)
(13) More use of devices to increase settlements by: (a) Certificates of readiness putting cases on calendar	1.7	4(20.0%)	10(50.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	6(30.0%)	20(100.0%)

	M	1—Excellent	2—Good	3—Uncertain	4—Poor	5—Very Poor	6—Blanks	Total
(b) Impartial medical witnesses	2.0	4(20.0%)	6(30.0%)	4(20.0%)	0 (0.0%)	0 (0.0%)	6(30.0%)	20(100.0%)
(c) Payment of interest by losing defendants to encompass the time from answer to verdict	3.9	0 (0.0%)	2(10.0%)	2(10.0%)	6(30.0%)	4(20.0%)	6(30.0%)	20(100.0%)
(d) Pre-trial conferences	2.6	2(10.0%)	10(50.0%)	0 (0.0%)	4(20.0%)	0 (0.0%)	4(20.0%)	20(100.0%)
(14) Night court	3.3	6(30.0%)	0 (0.0%)	2(10.0%)	0 (0.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(15) Reduction of trial-scheduling gaps (by changing from a calendar to an assignment system)	3.1	2(10.0%)	4(20.0%)	2(10.0%)	2(10.0%)	4(20.0%)	6(30.0%)	20(100.0%)
(16) Split-trials (separating liability and damage proceedings)	1.9	4(20.0%)	10(50.0%)	2(10.0%)	0 (0.0%)	0 (0.0%)	4(20.0%)	20(100.0%)
(17) Use of auditors or referee to assist judges	2.9	2(10.0%)	4(20.0%)	4(20.0%)	2(10.0%)	2(10.0%)	6(30.0%)	20(100.0%)
(18) Weekly public reports on judicial output	3.3	2(10.0%)	2(10.0%)	2(10.0%)	6(30.0%)	2(10.0%)	6(30.0%)	20(100.0%)

5. What impact do the following types of counsel generally have on the court time that you devote to cases? (VARIABLE: DELAY)

	M	1—Greatly Hasten	2—Hasten	3—Uncertain	4—Lengthen	5—Greatly Lengthen	6—Blanks	Total
(1) Assigned counsel	3.9	0 (0.0%)	2(10.0%)	2(10.0%)	6(30.0%)	4(20.0%)	6(30.0%)	20(100.0%)
(2) Client-paid attorney	2.5	2(10.0%)	8(40.0%)	4(20.0%)	0 (0.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(3) Group-paid attorney	3.0	2(10.0%)	2(10.0%)	6(30.0%)	2(10.0%)	2(10.0%)	6(30.0%)	20(100.0%)
(4) Legal Aid Society and the like	3.6	0 (0.0%)	2(10.0%)	4(20.0%)	6(30.0%)	2(10.0%)	6(30.0%)	20(100.0%)
(5) Out-of-town counsel	3.3	0 (0.0%)	2(10.0%)	10(50.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(6) Public defenders	3.3	2(10.0%)	4(20.0%)	4(20.0%)	2(10.0%)	6(30.0%)	2(10.0%)	20(100.0%)

6. What is your attitude toward establishing a sentencing division?
(VARIABLE: SPECIALIZATION)

1—Strongly Favor	2—Favor	3—Uncertain	4—Oppose	5—Strongly Oppose	6—Blanks	Total
2(10.0%)	4(20.0%)	0(0.0%)	8(40.0%)	2(10.0%)	4(20.0%)	20(100.0%)

M: 3.3

7. How should a presiding judge be chosen?
(VARIABLE: LEADERSHIP)

(1)	Appointed by the Judicial Council	0 (0.0%)	
(2)	By secret-ballot election	18 (90.0%)	Mode: 18
(3)	By seniority	0 (0.0%)	
(4)	By other methods (please specify)	0 (0.0%)	
(5)	Blank	2 (10.0%)	
Total		20(100.0%)	

8. Please indicate which of the following are serious or minor causes of delay in your court:
(VARIABLE: DELAY)

		M	1—Serious	2—Minor	3—Blanks	Total
(1)	Non-availability of witnesses at trials	1.3	10(50.0%)	4(20.0%)	6(30.0%)	20(100.0%)
(2)	Too many motions by defense	1.5	8(40.0%)	8(40.0%)	4(20.0%)	20(100.0%)
(3)	Too many motions by prosecution	2.0	0 (0.0%)	12(60.0%)	8(40.0%)	20(100.0%)
(4)	Too many objections by defense	2.0	0 (0.0%)	12(60.0%)	8(40.0%)	20(100.0%)
(5)	Too many objecions by prosecution	2.0	0 (0.0%)	12(60.0%)	8(40.0%)	20(100.0%)
(6)	Too many prosecutions	2.0	0 (0.0%)	12(60.0%)	8(40.0%)	20(100.0%)
(7)	Too many requests for continuances by the defense	1.4	8(40.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(8)	Too many requests for continuances by the plaintiffs	1.7	4(20.0%)	10(50.0%)	6(30.0%)	20(100.0%)

9. Should the ethnic composition of the national and state courts be generally proportionate to the ethnic composition of the jurisdiction?
(VARIABLE: IDEOLOGY)

	M	1—Strongly Agree	2—Agree	3—Uncertain	4—Disagree	5—Strongly Disagree	6—Best Man Regardless	7—Blank	Total
(1) U.S. Supreme Court	3.0	2(10.0%)	4(20.0%)	2(10.0%)	4(20.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)

	M	1—Strongly Agree	2—Agree	3—Uncertain	4—Disagree	5—Strongly Disagree	6—Best Man Regardless	7—Blank	Total
(2) U.S. Courts of Appeal	2.4	2(10.0%)	6(30.0%)	2(10.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(3) U.S. District Courts	2.3	6(30.0%)	4(20.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(4) California Supreme Court	3.0	2(10.0%)	4(20.0%)	2(10.0%)	4(20.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(5) California District Courts of Appeal	2.3	2(10.0%)	6(30.0%)	2(10.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(6) California Superior Courts	2.6	4(20.0%)	4(20.0%)	2(10.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(7) Superior Court of San Diego County	2.6	4(20.0%)	4(20.0%)	2(10.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(8) California Municipal Courts	2.4	4(20.0%)	6(30.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(9) Municipal Court, San Diego Judicial District	2.4	4(20.0%)	6(30.0%)	0 (0.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	20(100.0%)

10. Has the reclassification of some felonies into misdemeanors (as was done in Sec. 17B5 of the California Penal Code) significantly reduced the caseload in your court?
(VARIABLE: DELAY)

Yes	6(30.%)	
Uncertain	8(40.0%)	Mode 8
No	6(30.0%)	
Total	20(100.0%)	

11. How long do you think a presiding judge should serve?
(VARIABLE: LEADERSHIP)

(1)	Less than a year	0 (0.0%)
(2)	One year	0 (0.0%)
(3)	Two years	20(100.0%)
(4)	Three years	0 (0.0%)
(5)	Longer (please specify)	0 (0.0%)
	Total	20(100.0%) M: 20

12. What is the direction of your decisions in the following kinds of cases that you handle?
(VARIABLE: IDEOLOGY)

		M	1—Almost Always	2—Usually	3—Usually Not	4—Seldom	5—Miscellaneous	6—Blanks	Total
(1)	For expanding the speech and assembly provisions of the First Amendment	1.8	6(30.0%)	0 (0.0%)	0 (0.0%)	2(10.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(2)	For finding a constitutional violation in criminal cases	2.5	2(10.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(3)	For the administrative agency in business regulation cases	2.8	2(10.0%)	0 (0.0%)	4(20.0%)	2(10.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(4)	For the claimant in unemployment cases	1.7	2(10.0%)	4(20.0%)	0 (0.0%)	0 (0.0%)	4(20.0%)	10(50.0%)	20(100.0%)
(5)	For college students in disputes with police	2.6	2(10.0%)	4(20.0%)	0 (0.0%)	2(10.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(6)	For consumers in sales-of-goods cases	2.0	0 (0.0%)	8(40.0%)	0 (0.0%)	0 (0.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(7)	For debtors in creditor-debtor cases	2.8	0 (0.0%)	4(20.0%)	2(10.0%)	2(10.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(8)	For the defense in criminal cases	2.8	0 (0.0%)	4(20.0%)	2(10.0%)	2(10.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(9)	For the state government in tax cases	2.3	0 (0.0%)	4(20.0%)	2(10.0%)	0 (0.0%)	4(20.0%)	10(50.0%)	20(100.0%)
(10)	For the labor union in labor-management cases	2.0	0 (0.0%)	2(10.0%)	2(10.0%)	2(10.0%)	4(20.0%)	10(50.0%)	20(100.0%)
(11)	For the employee in employee-injury cases	2.0	0 (0.0%)	4(20.0%)	0 (0.0%)	0 (0.0%)	4(20.0%)	12(60.0%)	20(100.0%)

		M	1—Almost Always	2—Usually	3—Usually Not	4—Seldom	5—Miscellaneous	6—Blanks	Total
(12)	For the injured in motor-vehicle accident cases	2.3	0 (0.0%)	6(30.0%)	2(10.0%)	0 (0.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(13)	For the public employee in strike cases	1.8	2(10.0%)	6(30.0%)	0 (0.0%)	0 (0.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(14)	For the tenant in landlord-tenant cases	2.3	0 (0.0%)	6(30.0%)	2(10.0%)	0 (0.0%)	4(20.0%)	8(40.0%)	20(100.0%)
(15)	For the wife in divorce cases	2.3	0 (0.0%)	4(20.0%)	2(10.0%)	0 (0.0%)	4(20.0%)	10(50.0%)	20(100.0%)

13. How would you classify the following managerial problems facing a presiding judge in your court? (VARIABLE: LEADERSHIP)

		M	1—Critical	2—Significant	3—Minor	4—Blank	Total
(1)	Assessing judicial competency	2.3	2(10.0%)	6(30.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(2)	Assigning judges	1.6	6(30.0%)	10(50.0%)	0 (0.0%)	4(20.0%)	20(100.0%)
(3)	Budgeting	2.6	2(10.0%)	2(10.0%)	12(60.0%)	4(20.0%)	20(100.0%)
(4)	Case scheduling	1.4	10(50.0%)	6(30.0%)	0 (0.0%)	4(20.0%)	20(100.0%)
(5)	Disciplining judges	2.9	0 (0.0%)	2(10.0%)	12(60.0%)	6(30.0%)	20(100.0%)
(6)	Establishing and organizing divisions, departments, or districts	2.1	2(10.0%)	10(50.0%)	4(20.0%)	4(20.0%)	20(100.0%)
(7)	Evaluating practices and procedures	1.8	4(20.0%)	12(60.0%)	0 (0.0%)	4(20.0%)	20(100.0%)
(8)	Facilitating communications	2.4	0 (0.0)%	8(40.0%)	6(30.0%)	6(30.0%)	20(100.0%)
(9)	Increasing courtroom facilities	2.4	2(10.0%)	6(30.0%)	8(40.0%)	4(20.0%)	20(100.0%)
(10)	Maintaining courtroom security	1.6	6(30.0%)	10(50.0%)	0 (0.0%)	4(20.0%)	20(100.0%)
(11)	Maintaining good rapport with judges	1.8	4(20.0%)	12(60.0%)	0 (0.0%)	4(20.0%)	20(100.0%)
(12)	Maintaining good rapport with the public	1.9	2(10.0%)	12(60.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(13)	Maintaining good rapport with court staff	1.9	2(10.0%)	12(60.0%)	2(10.0%)	4(20.0%)	20(100.0%)
(14)	Maintaining records	2.5	0 (0.0%)	8(40.0%)	8(40.0%)	4(20.0%)	20(100.0%)
(15)	Measuring output	2.5	0 (0.0%)	8(40.0%)	8(40.0%)	4(20.0%)	20(100.0%)
(16)	Obtaining appropriations	2.4	2(10.0%)	6(30.0%)	8(40.0%)	4(20.0%)	20(100.0%)
(17)	Recruitment of staff	2.8	0 (0.0%)	4(20.0%)	12(60.0%)	4(20.0%)	20(100.0%)
(18)	Setting up committees	2.2	2(10.0%)	8(40.0%)	4(20.0%)	6(30.0%)	20(100.0%)
(19)	Staff training	2.5	0 (0.0%)	8(40.0%)	8(40.0%)	4(20.0%)	20(100.0%)
(20)	Use of computers	2.4	2(10.0%)	6(30.0%)	8(40.0%)	4(20.0%)	20(100.0%)

14. Please rank the following five qualities, using the numbers one through five, according to your estimate of their importance in choosing a presiding judge:
(VARIABLE: LEADERSHIP)

(1)	Affability	0 (0.0%)	
(2)	Organizational ability	4 (20.0%)	Mode: 4
(3)	Seniority	4 (20.0%)	
(4)	Willingness to try new procedures at times	2 (10.0%)	
(5)	Blank	10 (50.0%)	
	Total	20(100.0%)	

APPENDIX 4

DEMOGRAPHIC CHARACTERISTICS OF RESPONDENTS

1. Name: ----------

2. Age:

41-45	3	(15.0%)	Mean: 56; Range: 44-69
46-50	4	(20.0%)	
51-55	3	(15.0%)	
56-60	7	(35.0%)	
61-65	2	(10.0%)	
66-70	1	(5.0%)	
Total:	20	(100.0%)	

3. Birthplace: 15 (Outside California: 75.0%) 5 (In California: 25.0%)

4. Religion: 12 (Blank: 60.0%); 4 (Protestant: 20.0%); 2 (Catholic: 10.0%); 2 (Jewish: 10.0%)

5. Race: 20 (Caucasian: 100.0%)

6. Law School Attended:

20 { 16 (In California: 80.0%); 4 (Outside California: 20.0%);

20 { 5 (Stanford: 25.0%); 4 (U.S.C.: 20.0%); 4 (Balboa, later California Western: 20.0%); 7 (Miscellaneous: 35.0%)

7. Year of Admission to Practice: Mean: 1943; Range: 1924-1954

1921-1925	1	(5.0%)
1926-1930	1	(5.0%)
1931-1935	2	(10.0%)
1936-1940	3	(15.0%)
1941-1945	2	(10.0%)
1946-1950	8	(40.0%)
1951-1955	3	(15.0%)
Total:	20	(100.0%)

8. Previous Public Offices Held Before Becoming a Superior Court Judge:

Private Sector:		
Private Practice	11	(55.0%)
Public Sector:		
1. Municipal Court	3	(15.0%)
2. Prosecutor	3	(15.0%)
3. City Attorney	2	(10.0%)
4. State Elective Office	1	(5.0%)
Total:	20	(100.0%)

9. Year Appointed to This Bench: Mean: 1963; Range: 1947-1970

Before 1953	(Appointees of Governor Earl Warren)	1	(5.0%)
1953-1958	(Appointees of Gov. Goodwin Knight)	2	(10.0%)
1959-1966	(Appointees of Gov. Edmund G. Brown)	11	(55.0%)
1967-1970	(Appointees of Gov. Ronald Reagan)	6	(30.0%)
Total:		20	(100.0%)

Supplement:

1971	(Appointees of Gov. Ronald Reagan)	3
1972	(Appointees of Gov. Ronald Reagan)	2
Total:		5

(All together: 11) *i.e.*, 6 + 5

10. Names of Ancestors Who Served as Judges or in other Public or Private Positions in San Diego County:
19 (None: 95.0%); 1 (5.0%)

11. Political Party Affiliation:

	10	(Democrats: 50.0%);
	10	(Republicans: 50.0%)
Supplement (1972)	10	(Democrats: 37.0%);
	17	(Republicans: 63.0%)

Optional Signature: .....

Date: All in September-October 1971

NOTE

"DOING BUSINESS" IN COLORADO FOR FOREIGN CORPORATIONS: SERVICE OF PROCESS, QUALIFICATION, TAXATION

CONTENTS

INTRODUCTION

THIS note endeavors to define the phrase "doing business" as it applies to foreign corporations with contacts in Colorado. Depending on how much activity is involved, an out-of-state corporation may be subjected to three possible liabilities: the jurisdiction of local courts, qualification with local standards, and taxation by the state government. Since each liability requires a different degree of activity, it is possible to be "doing business" for service of process purposes and yet avoid the restrictions of qualification and taxation.

To determine the liabilities of a foreign corporation in Colorado it is necessary to analyze individually these three areas on a factual basis. Although the statutory guidelines are considered in each section, their tendency to be general and overly broad necessitates a concentration on case materials. Because the facts are of extreme importance in a determination of "doing business," it is presumptuous, if not impossible, to formulate a precise, consistent definition of the term. Nevertheless, an analysis of what the Colorado courts historically have considered to be significant contacts will narrow the possible interpretations of the phrase.

The section on service of process has been subdivided into tort and contract to reflect a distinction necessitated by the 1965 long arm statute. The introduction of the "tortious act" test by this statute has expanded Colorado's jurisdiction to reach out-of-state manufacturers and has created a new standard of liability. Qualification for "doing business" involves procedural as well as substantive considerations due to the doctrine of abatement. Taxation must be dissected into sales and use, income, and franchise taxes to appreciate the individual complexity of each. In contrast to the qualification issue, the taxation of foreign corporations possesses great potential for expansion in Colorado.

Overriding the statutory and case law of Colorado are the

constitutional interpretations of the United States Supreme Court. For service of process, "minimum contacts" is the general standard which must be met. Qualification and taxation are limited by the "undue burden on interstate commerce" test which prohibits unrestricted regulation and taxation of foreign corporations. This note will show that several Colorado statutes exceed these limitations, especially in the area of taxation.

I. Service of Process

A. *Constitutional Premise*

In questions of service of process and jurisdiction, there are two requirements which must be met to satisfy due process of law: actual notice and minimum contacts. The modern "notice" test has evolved from the case of *Mullane v. Central Hanover Bank & Trust Co.*[1] in which the Supreme Court held mere publication to be unsatisfactory by stating that "[t]he notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . ."[2]

The "minimum contacts" test is more difficult to characterize because of the varying application and interpretation given it by the courts. The leading case, which introduced the theory of "contacts" as opposed to "presence," is *International Shoe Co. v. Washington*[3] in which the Supreme Court held that to subject a person, corporate or otherwise, to in personam jurisdiction it must be proven that the party has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[4] This basic holding was supplemented by a "systematic and continuous" test for the contacts[5] and a recognition that the "quality and nature of the activity" would be as carefully considered as the quantity of the activity.[6]

The greatest extension of the "minimum contacts" test appeared in *McGee v. International Life Insurance Co.*[7] which maintained that "[i]t is sufficient for purposes of due process that the suit was based on *a contract* which had substantial connection with that State."[8] This expansive holding was

[1] 339 U.S. 306 (1950).
[2] *Id.* at 314.
[3] 326 U.S. 310 (1945).
[4] *Id.* at 316.
[5] *Id.* at 320.
[6] *Id.* at 319.
[7] 355 U.S. 220 (1957).
[8] *Id.* at 223 (emphasis added).

quickly restricted in *Hanson v. Denckla*[9] which narrowed the definition of the "quality" of a contact by holding that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the *benefits* and *protections* of its laws."[10]

B. *Colorado Statutory Law*

1. Notice

Colorado's service of process statutes for unqualified corporations have had a turbulent history. Because the purpose of this note is to determine the law as it exists today, it is sufficient to note that in 1964 the then-current foreign corporation service statutes were challenged and found to be unconstitutional for failing to satisfy the due process test of proper notice.[11] Under those statutes, "notice" consisted of informing the Secretary of State, who then forwarded the process by mail to the last known address of the foreign corporation. Notice was deemed complete when the process was mailed. Obviously, this method failed to meet the *Mullane* requirements of "reasonable to convey" and "reasonable time."

Currently, there are two statutes of importance in this area. The first is section 31-9-19(3)(a), the statute for service of process on unqualified foreign corporations.[12] Service may be personal or by registered or certified mail. If by mail, notice will not be complete until:

> [F]iling with the clerk of the court from which such process issued of the corporation's return receipt or, in the event the corporation refuses to accept such registered or certified mail, upon the filing of such mail with the corporation's refusal to accept indicated thereon . . . .[13]

Thus, the burden of ensuring satisfactory notice has been shifted from the Secretary of State to the party bringing suit. The second important Colorado statute is section 37-1-26, the long arm statute of 1965.[14] Service under this statute must be

[9] 357 U.S. 235 (1958).

[10] *Id.* at 253 (emphasis added). For a general discussion of service of process on foreign corporations see Note, *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960) and Note, *Jurisdiction over a Foreign Corporation*, 19 S.C.L. REV. 806 (1967).

[11] *See* Clemens v. District Court, 154 Colo. 176, 390 P.2d 83 (1964) (holding COLO. REV. STAT. ANN. § 13-8-8 (Supp. 1961) unconstitutional); Leach v. Farnsworth & Chambers Co., 231 F. Supp. 157 (D. Colo. 1964) (holding COLO. REV. STAT. ANN. § 31-35-19(3) (Supp. 1960) unconstitutional).

[12] COLO. REV. STAT. ANN. § 31-9-19(3)(a) (Supp. 1965). Subsections (1) and (2) deal with qualified corporations.

[13] *Id.*

[14] *Id.* §§ 37-1-26 to -27.

personal — not by mail. The importance of this distinction will be discussed later.

2. Minimum Contacts

The second issue, minimum contacts, appears in sections 31-9-19 and 37-1-26. The test common to both laws is "transacting business." For this note, it is most important to consider section 37-1-26 which subjects any person "whether or not a resident of the state of Colorado . . . to the jurisdiction of the courts of this state, concerning any cause of action arising from: (b) The transaction of any business within the state; (c) The commission of a tortious act within this state . . . ."[15]

The legal problem in interpreting these statutes centers on the determination of what constitutes "transacting business."[16] For each state this phrase has different connotations. Perhaps the most cautious assessment of this phrase was made by the Colorado Supreme Court:

> [T]he one rule which permeates all of the decisions, in which the question as to whether a foreign corporation is doing business in a state other than that in which it was chartered, is that *each case depends upon its own facts.*[17]

With this premise in mind, the analysis which follows will examine the facts of various cases in an attempt to ascertain the characteristic factors which influence the courts. The discussion is separated into tort and contract because of the creation in section 37-1-26 of a new test for tort actions involving foreign corporations.

C. *Colorado Case Law*

1. Tort

In tort, the 1965 long arm statute's "tortious act" test expanded the state's potential jurisdiction over foreign corporations. Prior to this act, it was necessary to establish "minimum contacts" through a "transacting business" analysis in order to subject a foreign corporate manufacturer to Colorado jurisdiction. Today, in a tort situation, "transacting business" need

[15] *Id.* §§ 37-1-26(1) (a)-(c). Sections (d) and (e) subject to jurisdiction any person who owns real property in the state or insures persons or property in the state. *See* Zerr v. Norwood, 250 F. Supp. 1021 (D. Colo. 1966) holding this statute constitutional. For parallel references to the statute's model, see ILL. REV. STAT. ch. 110, § 17 (1969).

[16] Although some writers have made an academic distinction between the meaning of "transacting business" and "doing business," this author will treat them synonymously because the courts, regardless of any possible legislative intent, interpret these phrases identically.

[17] Colorado Builder's Supply Co. v. Hinman Bros. Constr. Co., 134 Colo 383, 389, 304 P.2d 892, 895 (1956) (emphasis added).

only supplement the tortious act and possibly need not be proven at all.

a. *Prior to the 1965 Act*

A leading example of the Colorado approach to tort cases prior to the long arm statute is *Focht v. Southwestern Skyways, Inc.*[18] The injured plaintiff was attempting to join the foreign corporate manufacturer (X) as a third party defendant with the local seller (Y). The court, in analyzing the facts, noted that X was a Kansas corporation whose business was the production and sale of aircraft. X claimed to have no control over Y, and pointed out that delivery of any order made through Y was completed in Kansas. The aircraft was then flown by Y from Kansas to Colorado. X argued that title to the plane passed in Kansas, and there was no agency relationship binding X to Y nor connecting X to Colorado.

In a representative survey of the facts, the federal district court analyzed the distributor agreement between X and Y to determine X's contacts in Colorado and found:

1. Y was *required* to have all eight of X's models on hand.

2. Y was *required* to purchase and maintain sales promotion supplies and participate in promotional efforts.

3. Y was *required* to follow X's ordering procedures and to use X's forms.

4. *All* payment plans had to be approved by X.

5. Y was *required* to maintain service departments and absorb the cost of X's warranties.

6. Y was *required* to purchase its tools from X.

7. X had an interest in the capital structure of Y.

8. Y's accounting system was prescribed by X and their records were subject to review by X.

9. Reports were due from Y to X.

10. X had a factory school in Kansas where Y was "encouraged" to send at least one person per year.

It is impossible to discern which of these factors are most important for determining "doing business." The point is simply that the court will look to *every* possible relationship to assess the substantiality of the contacts. But, as the court noted, "it is not merely a matter of the frequency of the contacts, it is also the *extent of the control* that a corporation exerts in a state by means of devices such as the distributor agreement

[18] 220 F. Supp. 441 (D. Colo. 1963), *aff'd*, 336 F.2d 603 (10th Cir. 1964).

. . . referred to"[19] which will determine the status of "doing business." The court found an agency relationship, and concluded that *X* could be subjected to service of process and in personam jurisdiction in Colorado.[20] The decision was based on the *quality* as well as the *quantity* of the contacts.

b. *After the 1965 Act*

A case illustrative of the transition from "transacting business" to "tortious act" is *Lichina v. Futura, Inc.*[21] As in *Focht,* this case involved an injury occurring within Colorado as the result of a negligent act in manufacturing performed outside the state. The plaintiff — attempting to utilize the new long arm statute — argued that the "tortious act" arose within the state. The federal district court, through a literal interpretation of the Act, held that the tortious act itself, *i.e.,* the manufacturing, had to occur within the state for the plaintiff to obtain jurisdiction over the foreign corporate manufacturer.

Being reluctant to fully implement the uninterpreted Act, the federal court felt more comfortable with a "doing business" analysis similar to that found in *Focht.* The court noted that:

1. Salesmen of the foreign corporation had come to Colorado.
2. Several sales were consummated in Colorado.
3. Several sales were sent f.o.b. Colorado.
4. The products (ski tows and lifts) were designed for specific areas in Colorado.
5. After installation in the state, these instrumentalities were inspected by the foreign corporation.
6. The foreign corporation took a chattel mortgage on the lifts and tows and thereby kept a continuing interest in the equipment.

The total effect of these contacts satisfied the court that, under a *Hanson v. Denckla* analysis, the foreign corporation was enjoying the benefits and protections of Colorado law. This, when combined with the nature of the contact, one involving the public safety due to the use of the equipment, compelled the court to find that the corporation was "doing business" in Colorado. In this fashion, they avoided the use of the new "tortious act" provision.

[19] *Id.* at 443 (emphasis added).

[20] For other examples of the agency relationship for "doing business" for tort see Jones v. Wood, 208 F. Supp. 750 (D. Colo. 1962) and White-Rodgers Co. v. District Court, 160 Colo. 491, 418 P.2d 527 (1966).

[21] 260 F. Supp. 252 (D. Colo. 1966).

"Doing business," like all conflict questions, must eventually be resolved by application of state law.[22] Therefore, the state courts' interpretations are of greatest significance. The Colorado Supreme Court, when faced with a tort situation similar to that found in *Lichina*, was not as reluctant as the federal court to utilize the "tortious act" provision of section 37-1-26(1)(c). In *Vandermee v. District Court*,[23] the court directly confronted the question of whether the new act applied to a nonresident corporation which designed and manufactured an instrumentality outside of Colorado which, because of its defective design, caused injury to a Colorado resident within his state.

In analyzing section 37-1-26, the court found the intent of the Colorado Legislature to be "the expansion of our court's jurisdiction within constitutional limitations in order to provide a local forum for Colorado residents who suffer damages in Colorado as a result of tortious acts of non-residents."[24] The court concluded that the "act" had its situs in Colorado where the instrumentality failed and injured the plaintiff. The due process limitation was considered to be satisfied because the corporation manufactured its product with the intent to sell it for *ultimate use* in another state. To secure their argument, the court combined the "tortious act" test with a "minimum contacts" analysis, finding that the corporation had "set up channels of sales promotion and distribution in Colorado for the purpose of selling its products in Colorado."[25]

This liberal interpretation of the "tortious act" provision, holding the place where the injury occurred to be the situs of the "act," has been recently reaffirmed by the court in *Czarnick v. District Court*.[26] Here, the court followed the Illinois precedent of *Gray v. American Radiator & Standard Sanitary Corp.*,[27] a case explicitly rejected by the federal court in *Lichina*. The *Gray* case was viewed as persuasive precedent since it interpreted the Illinois long arm statute which Colorado used as its model. The supreme court in *Czarnick* referred to the "ultimate use" test of *Gray* which had been used in *Vandermee*:

> As a general proposition, if a corporation elects to sell its products for *ultimate use* in another State, it is not unjust to hold it

[22] Litvak Meat Co. v. Baker, 446 F.2d 329, 332 (10th Cir. 1971).
[23] 164 Colo. 117, 433 P.2d 335 (1967).
[24] *Id.* at 121, 433 P.2d at 337.
[25] *Id.* at 124, 433 P.2d at 338.
[26] 488 P.2d 562 (Colo. 1971).
[27] 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

> answerable there for any damage caused by defects in those products.[28]

The most recent case in this area illustrates the limits of the "ultimate use" test. In *Granite States Volkswagen, Inc. v. District Court*,[29] the situation involved a plaintiff who purchased a car in New Hampshire, and drove it to Colorado where he was injured. Alleging injury as a result of faulty manufacturing, the plaintiff, a resident of Colorado, attempted to gain jurisdiction over the manufacturer and the New Hampshire dealer.

The New Hampshire dealer, after being personally served in his state, moved to have the service quashed, denying any agent, property, or contacts within Colorado. The supreme court, in supporting the dealer's position, took notice of section 37-1-26(1)(c) and the *Vandermee* and *Czarnick* holdings. The court differentiated this situation from the earlier cases in which "the defendant-manufacturer availed itself of the channels of interstate commerce, and its product was distributed for ultimate use in numerous states."[30] In contrast, the dealer in *Granite* was strictly in business in New Hampshire and had no authority to sell or ship beyond that state. The fact that the instrumentality was mobile was held not sufficient to alter the situation.

Looking to *Hanson v. Denckla,* the court noted that "the defendant must have taken voluntary action calculated to have an effect in the forum state."[31] The fact that the injured buyer had informed the dealer, at the time of sale, that she intended to use the car in another state was considered insufficient to change the local character of the business. Since the dealer did not solicit interstate business or use channels of interstate commerce to sell the automobiles, due process prevented the subjection of the defendant to Colorado's jurisdiction.

c. *Summary*

In a tort action where the injury occurs in Colorado and the plaintiff attempts to obtain jurisdiction over a foreign corporate dealer or manufacturer, "doing business" and "tortious act" are the two tests the court will use in analyzing the issue. On any particular occasion, the court may choose to emphasize one test as opposed to another. Both satisfy the

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[28] 488 P.2d at 563, *quoting Gray* (emphasis added).
[29] 492 P.2d 624 (Colo. 1972).
[30] *Id.* at 625.
[31] *Id.* at 625-26.

due process test of "minimum contacts" found in *International Shoe.*

In view of its judicial acceptance and liberal interpretation, the "tortious act" provision of the new 1965 long arm statute appears to be the simplest test to apply. The older "doing business" test involved problems of quantitative and qualitative analysis resulting in a highly unpredictable balancing of facts. In contrast, the "tortious act" test has developed into a simplified question of "ultimate use." All that need be proven is that the foreign corporation availed itself of the channels of interstate commerce in order that its product be ultimately used in other states. But, if the foreign corporation can show that its business is a local one, purely intrastate in character, then due process safeguards, as expressed in the *Granite* case, will prevent the exercise of Colorado jurisdiction.

2. Contract

In the area of contract, there has been little change in the statutory law in recent years.[32] Consequently, the test for "transacting business" is the same today as before the 1965 amendment. The one subtle but important addition to the law is the introductory phrase, "concerning any cause of action arising from" the transacting of business, found in section 37-1-26(1). This key language will be examined in cases discussed below.

Basically, the Colorado courts use a listing of contacts test identical to the pre-1965 tort cases in an attempt to satisfy the requirements of *International Shoe* and *Hanson v. Denckla.* Consequently, the best analytical approach is to outline the contacts considered important by the courts and attempt to generalize a conclusion from these facts.

a. *Manufacturer-Distributor*

In *Colorado Builder's Supply Co. v. Hinman Bros. Construction Co.*,[33] the dealer was suing for the unpaid balance on a purchase. As often happens, the buyer counterclaimed against the dealer and the manufacturer for breach of warranty. In deciding whether the foreign corporate manufacturer was subject to in personam jurisdiction in Colorado, the court factually dissected the relationship between the local dealer and the foreign corporation (X) finding:

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[32] Note the "transacting business" requirement in COLO. REV. STAT. ANN. §§ 31-35-19(3) (Supp. 1960), 31-9-19(3) (1963), 31-9-19(3)(a), 37-1-26(1)(b) (Supp. 1965).

[33] 134 Colo. 383, 304 P.2d 892 (1956).

1. *X* did not sell directly to the public any of the equipment it manufactured.

2. The relationship between *X* and its distributors was purely contractual.

3. *X* had its plants in Georgia and Illinois.

4. All sales were completed at these plants.

5. Title to the equipment was transferred to the distributor at the time the invoice was made.

6. *X* employed district representatives and service engineers.

Since service was made on an engineer, the court analyzed his, and therefore *X*'s, relationship with Colorado. The engineer was a representative for a five-state region, and his only duties were to *advise* and *counsel* the distributors "in the promotion of sales."[34] After each of his promotional trips, he reported to *X* on the progress being made in merchandising their product. Other facts considered by the court were: the engineer had no authority to sell *X*'s product; although he lived in Denver, he spent only 5 to 8 percent of his working time there; he had no office in Colorado; and, he was paid by salary without commission.

The conclusion reached by the court was that *X* was not "doing business" in Colorado for purposes of service of process and in personam jurisdiction. The facts considered in reaching this decision typify the concern of the court with the relationship between a foreign corporation and: (1) the ultimate buyer, (2) the distributor, (3) the state in general, (4) the person served, and (5) the relation between the person served and the state. Primarily, the court was searching for an *agency relationship* through which the foreign corporation could bind Colorado residents to contracts. In this respect, the key fact in *Colorado Builder's* was the engineer's inability to bind anyone to a contract with *X*. The other important consideration was the relationship between the manufacturer and the distributor. Unlike *Focht,* the facts in *Colorado Builder's* were insufficient to support a finding of an agency relationship.

Several rules adopted by the court in *Colorado Builder's* are worth noting. First, it supported the holding of *Louisville & Nashville Railroad Co. v. Chatters*[35] by stating that:

> [A] greater quantum of "doing business" within the state of the forum is essential to jurisdiction where the claim asserted does

[34] *Id.* at 386, 304 P.2d at 894.

[35] 279 U.S. 320 (1929).

> not arise out of corporate activities within that state, than would be required in a claim arising out of corporate conduct within the state.[36]

This test may not be valid today. The 1965 amendment limits jurisdiction over a foreign corporation transacting business to a "cause of action arising from"[37] such transaction. *Colorado Builder's* implies that, if the "arising from" test is not met, a higher quantum of evidence is necessary to satisfy due process. The 1965 Act, in contrast, can be argued to stand for the rule that the action *must* arise from the transaction of business or jurisdiction will not attach.

A second holding in *Colorado Builder's* worth comment is the quotation from *Colorado Iron-Works v. Sierra Grande Mining* Co.:[38]

> In order to invoke the aid of our own courts in the collection of such debt, it is not necessary for a citizen of this state to show that the debtor was doing business generally in this state, but that he is a debtor; that the debt is due and payable here; and the debtor, whether a natural or an artificial person, if brought by process within the jurisdiction, is amenable to our courts.[39]

This holding narrows the defenses of a foreign corporation by stating that a debt, while not necessarily equal to "doing business," is sufficient to subject a foreign corporation to jurisdiction. The most important requirement is that the debt of the corporation be *due* and *payable* in Colorado.

Thus, *Colorado Builder's* exemplifies a multi-step process of determining "doing business." *Every* fact which might establish a relationship between the corporation and the state will be considered both quantitatively and qualitatively, individually and in sum. Note also, if the buyer had been suing in tort under the modern statute, the foreign corporation would have been subjected to Colorado jurisdiction because of his negligent manufacturing, and no proof of "doing business" would have been necessary.[40]

b. *Employer-Employee*

Another type of situation involving foreign corporations is where a salesman-employee sues *X* corporation for unpaid commissions. This situation arose in *Hibbard, Spencer, Bartlett & Co. v. District Court*[41] where the employment contract was made

[36] 134 Colo. at 390, 304 P.2d at 896.

[37] COLO. REV. STAT. ANN. § 37-1-26(1)(b) (Supp. 1965).

[38] 15 Colo. 499, 25 P. 325 (1890).

[39] 134 Colo. at 390, 304 P.2d at 896.

[40] *See* discussion pp. 535-38 *supra*.

[41] 138 Colo. 270, 332 P.2d 208 (1958). For an identical case and holding see American Type Founders Co., Inc. v. District Court, 154 Colo. 156, 389 P.2d 85 (1964).

outside the state, forcing the employee to obtain local jurisdiction through a "doing business" argument. The court considered the following facts:

1. The employee-salesman showed samples of *X*'s product to Colorado customers.

2. Customers ordered after seeing the samples and the catalogue.

3. The salesman wrote up the orders and sent them to *X*.

4. The salesman expedited the delivery.

5. The salesman assisted in the collection of delinquent accounts.

6. The salesman solicited new accounts.

7. *X* sent merchandise to Colorado for display.

8. The salesman was a full-time employee of *X*.

9. *X* made $200,000 per year in Colorado.

To counter these facts, the corporation argued that, although it had once been doing business in Colorado, its current activities were minimal. The court recognized this defense, but noted that the decrease in activity had occurred within the last year and that *X* still maintained salesmen in the state. The court concluded that *X* was "doing business" in Colorado and was properly subject to in personam jurisdiction.

A supplement to the above-listed contacts can be found in *Elliott v. Edwards Engineering Corp.*[42] where a salsman-employee's activities were again analyzed. The court considered the following facts to be relevant: the relationship between the employee and the foreign corporation (*X*), the listing of *X* in a Colorado phone book, the quantity of business done by *X* through its employee, and whether the action arose from dealings in the state. The court granted a motion to quash service of process because of a lack of contact between *X* and Colorado.

c. *Parent-Subsidiary*

A common problem in the area of contract is the parent-subsidiary relationship. As in other contract situations, the facts always dictate the result. However, the Colorado courts have established certain definite exceptions to protect a parent from being characterized as "doing business" simply because it has a subsidiary in the state. The supreme court has held:

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[42] 257 F. Supp. 537 (D. Colo. 1965), *aff'd per curiam*, 364 F.2d 991 (10th Cir. 1966).

> [T]he mere presence in Colorado of [a] wholly owned subsidiary, standing alone, does not in and of itself subject the absent parent corporation to our state's jurisdiction, where the two companies are operated as distinct entities . . . .[43]

This holding was reaffirmed in *Perlman v. Great States Life Insurance Co.*[44] which states:

> [W]here the parent and its subsidiary maintain separate identities and charge each other for services performed . . . the corporations will be treated as separate entities for the purpose of determining personal jurisdiction.[45]

Although this rule appears to be predictable on its face, the court in *Perlman* examined certain contacts between the parent and the subsidiary and concluded that these two entities need not be as separate as the above-quoted language seems to imply. First of all, "loans to a corporate subsidiary . . . do not constitute doing business, nor would the purchase of services from such entities."[46] Most importantly, "[n]either does stock ownership in a domestic company nor common directors, establish that [the parent] was doing business in Colorado."[47] This holding appears to interpret liberally "separate entity" for "doing business" purposes. In general, the test used by courts in determining when the parent of a subsidiary located in Colorado will be subject to in personam jurisdiction is similar to the test used for determing when the corporate veil will be pierced in general corporate liability suits.

d. *Advertising*

An important case which analyzes the question of when advertising will meet the "minimum contacts" test is *Safari Outfitters, Inc. v. Superior Court.*[48] Here, in an action for breach of contract, the court restated its view that the "legislature intended to extend the jurisdiction of our courts to the fullest extent permitted by the due process clause . . ." by enacting the 1965 statute.[49] In this case the contacts were listed:

1. Foreign corporation *X* had advertised in three national magazines.

2. Plaintiff-buyer, a resident of Colorado, wrote to *X* in response to the advertisement.

3. *X* mailed brochures to plaintiff.

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[43] Bolger v. Dial-A-Style Leasing Corp., 159 Colo. 44, 48, 409 P.2d 517, 519 (1966).

[44] 164 Colo. 493, 436 P.2d 124 (1968).

[45] *Id.* at 496-97, 436 P.2d at 125.

[46] *Id.* at 497, 436 P.2d at 126.

[47] *Id.* at 496, 436 P.2d at 125.

[48] 167 Colo. 456, 448 P.2d 783 (1969).

[49] *Id.* at 459, 448 P.2d at 784.

4. There was at least one interstate phone call.

5. There were 16 interstate letters.

6. $10,000 worth of checks payable to *X* had been drawn by the plaintiff on a Denver bank.

The supreme court held that these contacts did not constitute "doing business" because advertising was too tenuous a contact. The court also noted that interstate phone calls and the receipt of checks were not acts "by which the petitioner [*X*] purposefully availed himself of the privilege of conducting activities within Colorado, thus invoking the benefits of its laws."[50]

In contrast to this holding that advertising is not a sufficient contact for service of process, section 138-5-2(22)(a)(c) of the Colorado statutes defines "doing business" for taxation purposes to include the "distribution of catalogues or other advertising" for solicitation.[51] This statute will be examined as to its constitutional validity in part three of this note.

e. *"Arising From"*

As mentioned earlier, an important consideration under the new long arm statute is whether the action *arose from* the transacting of business in Colorado. Although few cases have interpreted this phrase, the issue was confronted in *Knight v. District Court.*[52] The plaintiff, a Colorado corporation, sued a Utah resident on a promissory note. The defendant had come to Colorado and had negotiated a loan with the plaintiff-bank. Three months later, the promissory note was renegotiated in Utah.

The court, looking to section 37-1-26 for guidance, held that the renewal note had its "genesis" in the initial Colorado transaction. Because of the relationship between the two notes, the plaintiff's claim was considered to have "arisen from" business transacted in Colorado, and therefore the defendant was subject to Colorado's jurisdiction.[53]

The federal court limited this opinion by holding in a later case that if "no negotiations have been conducted in the forum state, the minimum contacts necessary for personal jurisdiction

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[50] *Id.* at 460-61, 448 P.2d at 785.

[51] COLO. REV. STAT. ANN. § 138-5-2(22)(c) (Supp. 1967).

[52] 162 Colo. 14, 424 P.2d 110 (1967).

[53] For another promissory note case using COLO. REV. STAT. ANN. § 37-1-26 (Supp. 1965) see Circle A Drilling Co. v. Sheehan, 251 F. Supp. 242 (D. Colo. 1966). *See also* Clinic Masters, Inc. v. McCollar, 269 F. Supp. 395 (D. Colo. 1967).

are found wanting."[54] The simple fact that payment alone occurred in the state will not suffice to capture the foreign person; and "the mere existence of a contract executed by a Colorado resident . . . is [not] sufficient to confer personal jurisdiction over an absent nonresident defendant."[55]

Although little can be said at present about the phrase "arising from," this phrase will be of paramount importance in any action where it is necessary to establish jurisdiction through a "doing business" test. A potential question is: What happens to a foreign corporation which commits a tort outside the state which was the direct result of a contract made between the parties in Colorado? Did the tort "arise from" the transaction of business in Colorado? This extension of the long arm statute is conceivable, especially in view of part statutory construction used by the courts in expanding Colorado's jurisdiction. "Arising from" has the potential to become the judiciary's most powerful tool in implementing this expansion.

f. *Procedure*

A final case worthy of note because of its procedural implications is *Geer Co. v. District Court.*[56] Here, a buyer counterclaimed against the dealer and manufacturer in response to a claim for nonpayment. The buyer served notice on the manufacturer under section 31-9-19(3)(a), serving the secretary of state and the manufacturer by mail. Although successful at the trial level, on appeal the plaintiff attempted to support her jurisdictional claim by use of section 37-1-26, the long arm statute. The supreme court reversed in favor of the manufacturer and refused to accept the changed plea.

Plaintiff's error was in her original complaint which alleged that the manufacturer was doing business in Colorado "through its agent," the dealer.[57] The defendant easily defeated this unnecessarily narrow complaint by proving that its relationship with the dealer was one of purchaser-seller.

The plaintiff made two errors: one strategic, the other legal. Strategically, she should not have limited her claims of "doing business" to the agency factor. As previously discussed, an agency relationship is merely one of many facts to be considered in determining whether a foreign corporation is "doing business" in Colorado. In the face of a broader complaint, the

[54] Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co., 323 F. Supp. 996, 1000 (D. Colo. 1971).

[55] *Id.* at 1001.

[56] 172 Colo. 48, 469 P.2d 734 (1970).

[57] *Id.* at 50-51, 469 P.2d at 735.

defendant's rebuttal of the agency relationship would not necessarily have defeated the service of process, especially since there were other contacts indicating that the manufacturer was "doing business" in the state.

The second error, legal in nature, was the attempted change in plea on appeal. Since service was by mail, the plaintiff was barred from using the long arm statute, which requires personal service. The move to alter the plea illustrates plaintiff's lack of understanding of the difference between the statutes. It is not required that agency be proven under one and not the other. The test for both laws is *transacting business.* The error was in the original complaint, not in choice of statute.

The conclusion is a caveat: since "[t]he burden of proof is on the . . . plaintiff to establish by competent evidence all the facts essential to the court's jurisdiction,"[58] there is no reason to increase this burden by drafting an overly specific complaint. The statutes require that "transacting business" be proven to subject a foreign corporation to service of process and jurisdiction. Therefore, this is all that need be pleaded in such a case.

g. *Summary*

The following questions should be asked when determining a foreign corporation's status for service of process in Colorado for all nontortious cases. The answers to these questions may establish facts which either alone or in combination may constitute "doing business":

1. Does foreign corporation X sell directly to the public in Colorado?

2. If it does, where are the sales completed?

3. How is delivery effectuated?

4. Is the instrumentality sent f.o.b. Colorado?

5. Does X maintain a security interest in the instrumentality?

6. If X does not sell directly, what is the relationship between X and its distributors?

7. What is the relationship between X and its salesmen?

8. What is the relationship between X and its employees in Colorado?

9. What authority do the distributors, salesmen, and employees have to bind X contractually?

10. What are the duties of the distributors, salesmen, and

[58] *Id.* at 52, 469 P.2d at 736.

employees in Colorado?

11. For how much territory are the distributors, salesmen, and employees responsible?

12. Do the distributors, salesmen, and employees live in Colorado?

13. Is *X* listed in a state phone book, either independently or concurrently with its employee, salesman, or distributor?

14. What is the quality of business done by *X* in Colorado?

15. What is the quantity of business done by *X* in Colorado?

16. Does *X* have a debt due and payable in Colorado?

17. If *X* has a subsidiary in Colorado, what is their relationship?

18. Do *X* and the subsidiary have common directors?

19. Does *X* control the subsidiary's stock?

20. Do *X* and the subsidiary charge each other for services performed?

21. Is *X*'s only contact in Colorado through advertising?

22. If the solicitation is successful, how is the sale made?

23. Does *X* negotiate contracts in Colorado?

24. Are the contracts merely payable in Colorado?

25. Does a cause of action arise from any of the above transactions of business?

II. QUALIFICATION

According to the Colorado Supreme Court:

> [T]here is a distinction between "doing business" by a foreign corporation such as would subject it to the jurisdiction of courts not of its domicile, and "doing business" of the character that would subject it to the power of the state to impose regulations upon its activities.[59]

This position is further supported by Professor Leflar who feels that "more activity is required to subject a corporation to the penalties of a qualification statute than to subject the corporation to taxation on its local business or to service of process on unauthorized agents."[60]

Few qualification cases have appeared in Colorado in the last 50 years. This sparsity is partly due to the heavier burden of proof necessary to establish "doing business" for qualifica-

[59] Begole Aircraft Supplies, Inc. v. Pacific Airmotive Corp., 121 Colo. 88, 89-90, 212 P.2d 860, 861 (1949).

[60] R. LEFLAR, AMERICAN CONFLICTS LAW 615 (1968).

tion purposes. More importantly, the penalty in Colorado for failure to qualify is too minimal to encourage litigation.[61]

A. *Constitutional Premise*

As with service of process and taxation, there are certain basic constitutional maxims which override the area of qualifying to do business in a state. Although due process and equal protection are potential constitutional restrictions, the key issue in qualification is: Does the state statute interfere with the free flow of interstate commerce and thereby place an undue burden on that commerce?

As a basic premise, it has been held that "the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce."[62] Furthermore, requiring that a corporation obtain a certificate to do business "is a conventional means of assuring responsibility and fair dealing on the part of foreign corporations coming into a State . . . . In short, it is a *supervisory* and not a fiscal measure."[63]

These theories are based on the constitutional philosophy that a state can protect "the health, safety, morals and welfare of its people" even though its restrictions affect interstate commerce "incidentally" or "indirectly."[64] In sum, the issues which all courts must analyze in qualification cases are: (1) What is the *nature* of the commerce? (2) Would a qualification requirement place an *undue burden* on that commerce?

The most recent expression by the United States Supreme Court on these issues is *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*,[65] a decision which split the Court 4-1-4. The parties in the suit were both corporations, one from Indiana, the other from New Jersey. The former wished to enjoin the latter from selling its goods at prices below the minimum set in a retail contract which was executed by the parties in New Jersey. The defendant argued that, under New Jersey law,[66] only foreign corporations qualified to transact business in the state are allowed to bring any action there on a contract. In response, the foreign corporate plaintiff alleged that its business in New

[61] *See generally* Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955); Note, *Corporations — State Regulation of Foreign Corporations — Interstate v. Intrastate Business*, 19 ALA. L. REV. 193 (1966); Note, *The Entry and Regulation of Foreign Corporations Under New Mexico Law and Under the Model Business Corporation Act*, 6 NAT. RES. J. 617 (1966).

[62] Union Brokerage Co. v. Jensen, 322 U.S. 202, 209 (1944).

[63] *Id.* at 210 (emphasis added).

[64] Sioux Remedy Co. v. Cope, 235 U.S. 197, 201 (1944).

[65] 366 U.S. 276 (1961).

[66] N.J. REV. STAT. § 14:15-3 to -4 (1937).

Jersey was entirely in interstate commerce, and therefore, the filing requirement violated the commerce clause.

The Supreme Court upheld New Jersey's statute and the position of the defendant by characterizing the plaintiff's activities as both interstate *and* intrastate. The Court noted that "[i]t is well established that New Jersey cannot require [the Indiana corporation] to get a certificate of authority to do business in the State if its participation in this trade is limited to its *wholly interstate* sales to New Jersey wholesalers."[67] On the other hand, the Court held that "it is equally well settled that if [the Indiana corporation] is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business."[68]

Following these premises, the Court analyzed the facts and noted that the plaintiff hired a number of persons who lived and worked in New Jersey, had an office in New Jersey, was listed in a state phone book, and paid its New Jersey secretary by salary. The fact that the litigation was based on the interstate aspects of plaintiff's business was held immaterial, and the defendant's position was upheld.

Justice Douglas, in dissent, argued that the plaintiff's employees were equal to "drummers" and he compared the case to *Robbins v. Shelby County Taxing District.*[69] Unlike the majority, he did not want to separate these activities from plaintiff's interstate business because "[h]ere the *dominant activity* is nothing more than advertising and public relations. These are the minimum activities in which every 'drummer' for an out-of-state concern engaged."[70] Therefore, he considered such activities to be "exclusively in furtherance of interstate commerce."[71]

Although this case has been cited as holding that a state is precluded "from exacting a license of a firm doing an exclusively interstate business as a condition of entry in the

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[67] 366 U.S. at 278 (emphasis added). The Court cited Robbins v. Shelby County Tax. Dist., 120 U.S. 489 (1887), Crutcher v. Kentucky, 141 U.S. 47 (1891), International Textbook Co. v. Pigg, 217 U.S. 91 (1910), and Sioux Remedy Co. v. Cope, 235 U.S. 197 (1914).

[68] *Id.* at 279. The Court cited Railway Express v. Virginia, 282 U.S. 440 (1931) and Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944).

[69] 120 U.S. 489 (1887).

[70] 366 U.S. at 292.

[71] *Id.* at 291, *quoting* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

State,"[72] it has also been interpreted in a more liberal fashion.[73] For this note, the importance of the case is its typification of the issues considered, and the problems they create, in an example qualification case. As with service of process and taxation, the conclusion is ultimately one of fact, a test which gives rise to 4-1-4 opinions like *Lilly*.[74]

B. *Colorado Statutory Law*

The basic law in Colorado on qualification is section 31-9-1(1) which states: "No foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state."[75] If a foreign corporation complies with the procedures,[76] it will "enjoy the same, but no greater, rights and privileges as a domestic corporation . . . ."[77]

Most foreign corporations are concerned with the penalties for failure to file. In Colorado, the primary sanction is that the corporation shall not be permitted "to maintain any action, suit or proceeding in any court of this state, until such corporation shall have obtained a certificate of authority."[78] This prohibition, which simply abates the action, will be discussed later. This penalty is supplemented by section 31-9-3(3) which holds the unauthorized corporation liable "in an amount equal to all fees which would have been imposed by this code upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required . . . ."[79]

The laxity of these penalties is emphasized by section 31-9-3(2) which states that the failure of a foreign corporation to obtain a certificate "shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding

[72] Justice Douglas' dissent to the Court's dismissal of the appeal of People v. Fairfax Family Fund, Inc., 235 Cal. App. 2d 881, 47 Cal. Rptr. 812 (1964), in Fairfax Family Fund, Inc. v. California, 382 U.S. 1, 2 (1965).

[73] *See* Champion Spark Plug Co. v. T.G. Stores, Inc., 239 F. Supp. 941 (D. Md. 1965), *aff'd*, 356 F.2d 462 (4th Cir. 1966).

[74] Note that for interstate carriers there are different issues which will not be discussed in this paper. *See* Davis v. Farmers Co-Operative Equity Co., 262 U.S. 312 (1923).

[75] COLO. REV. STAT. ANN. § 31-9-1(1) (1963).

[76] Every foreign corporation authorized to do business in Colorado must: (1) have a registered office and (2) have a registered agent for service of process. COLO. REV. STAT. ANN. §§ 31-9-17 (1963), 31-9-18 (Supp. 1965).

[77] *Id.* § 31-9-4 (1963).

[78] *Id.* § 31-9-3(1). The importance of this section for franchise taxes will be discussed *infra*.

[79] *Id.* § 31-9-3(3).

in any court of this state."[80] This laxity has resulted in a limited amount of litigation in Colorado on the issue.[81] The remainder of the statute itemizes the formal procedures involved,[82] yet nowhere in the act is the term "transacting business" defined.[83]

C. *Colorado Case Law*

Since a definition of "transacting business" is unavailable at the statutory level, it is necessary to look to the common law for guidance. Unfortunately, very few qualification cases have been litigated in Colorado in the last 50 years. However, cases from the 19th and early 20th centuries, even though based on different statutory requirements, can provide basic premises which remain valid. The reliance of the Supreme Court upon old precedent in *Lilly* demonstrates the relevance of past cases. There is an abundance of Colorado cases during this early period due to the stiff penalties then imposed by the qualification statutes. Instead of merely preventing an unqualified corporation from suing until it filed a certificate, the law held all officers, agents, stockholders, and directors *personally liable* for anything that occurred while unqualified. Furthermore, all contracts made during this noncertified period were considered *void*.[84]

1. Substance

a. *One Act v. Continuous Transaction*

For service of process, *McGee*[85] held one contract to be a sufficient contact for "doing business" in a foreign state. This test is not valid for qualification purposes.

In 1913, the Colorado Court of Appeals faced this issue

[80] *Id.* § 31-9-3(2).

[81] Note in contrast the strict sanctions imposed by other states for failure to qualify. *See* Note, *Sanctions for Failure to Comply with Corporate Qualification Statutes*, 63 COLUM. L. REV. 117 (1963).

[82] COLO. REV. STAT. ANN. §§ 31-9-5 (1963) — corporate name (form F-2), 31-9-6 (1963) — change of name (form F-3), 31-9-7 (Supp. 1965) — what application must contain, 31-9-8 (1963) — how to file, 31-9-9 (1963) — purpose stated in application, 31-9-10 (1963) — amendment to corporation's articles (form F-4), 31-9-11 (Supp. 1967) — amendment to certificate (form F-3), 31-9-12 (Supp. 1967) — revocation of certificate by the secretary of state, 31-9-13 (1963) — issuance of certificate of revocation, 31-9-14 (1963) — filing of articles of merger, 31-9-15 (Supp. 1967) — withdrawal (form F-5), 31-9-16 (1963) — filing of certificate of withdrawal, 31-9-17 (1963) — registered office and agent, 31-9-18 (Supp. 1965) — change of registered office or agent.

[83] For examples of definitions of "doing business" for qualification see ABA-ALI MODEL BUS. CORP. ACT § 106 (1971) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 311 (1971).

[84] *See* Ch. 19, § 23, [1877] Colo. Sess. Laws 151 (General Laws of Colorado); Ch. 52, §§ 1-14, [1901] Colo. Sess. Laws 116. For a case on officer liability see King Copper Co. v. Dreher, 68 Colo. 554, 191 P. 98 (1920).

[85] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

in *Cockburn v. Kinsley*.[86] There, a foreign corporation, which had made a contract in the state, denied "doing business" in Colorado. The court noted that the purpose of the then-existent qualification statute[87] was to require filing by foreign corporations which were "engaging in the general prosecution and operation of the ordinary business which they were incorporated to carry on . . . in order that the state authorities may supervise and control their transactions . . . ."[88] Therefore, the court felt that "a single act or business transaction is not 'doing business' within the meaning of the [qualification] statute . . . ."[89]

The court made a distinction between "doing business" for service of process and "doing business" for qualification, and held that "cases involving motions to quash the service upon a foreign corporation are not controlling in cases such as the present one."[90] However, the court noted that, if it can be proven that a corporation is not "doing business" for service of process, it definitely is not "doing business" for qualification "because an inconsiderable transaction of business ought to be sufficient in the former instance that would not be at all sufficient in the latter."[91]

Another important case on this issue of continuous contacts is *Cooper Manufacturing Co. v. Ferguson*[92] where the plaintiff, an Ohio corporation, had made a contract with a citizen of Colorado. The defendant breached the contract; but the plaintiff, when suing for damages, was confronted with the defense that it had failed to file a certificate, thereby making the contract invalid under the current law.[93]

The United States Supreme Court held that, because the contract was the only business ever conducted by the corporation in Colorado, it was not "doing business" for qualification purposes. The Court further stated that a foreign corporation must *ordinarily transact* business to be subject to a qualification statute, although the "extent of exercise of these powers" was left undecided.[94] In contrast to the modern *McGee* doctrine for service of process, the Court held that the "prohi-

[86] 25 Colo. App. 89, 135 P. 1112 (1913).
[87] Ch. 52, §§ 1-14, [1901] Colo. Sess. Laws 116.
[88] 25 Colo. App. at 109, 135 P. at 1118.
[89] *Id.* at 100, 135 P. at 1116.
[90] *Id.* at 103, 135 P. at 1117.
[91] *Id.*
[92] 113 U.S. 727 (1885).
[93] Ch. 19, § 23, [1877] Colo. Sess. Laws 151 (General Laws of Colorado).
[94] 113 U.S. at 734 (emphasis by the court).

bition against doing any business cannot . . . be literally interpreted,"[95] and that the Colorado constitution[96] did *not* refer to a single act but rather to the *"carrying on of business* by a foreign corporation."[97] Since this section of the state's constitution has yet to be amended, this interpretation is valid today.

b. *Interstate v. Intrastate Commerce*

Another case relevant to a substantive interpretation of the current statutes is *Butler Brothers Shoe Co. v. United States Rubber Co.*[98] There, the defendant, a Colorado corporation, had contracted with a New Jersey corporation to sell goods, retaining certain funds in a Colorado account for the plaintiff-foreign corporation. When the defendant defaulted in payments and the plaintiff sued, the defendant alleged that the New Jersey corporation was not licensed to do business in Colorado, and, therefore, the contract was void.[99] Citing *Cooper,* the defendant argued that a foreign corporation "cannot lawfully exercise any corporate power or do any business whatever in the State of Colorado without compliance with the requirements of its statutes."[100]

The court, in disagreeing with the defendant, noted that *all* corporations have the right to "institute and maintain in the federal courts . . . its suits in every other state . . . ."[101] More importantly, the contracts between the two parties were considered to be interstate in nature. The Colorado law was held to be "ineffectual to restrain or modify the power or duty of the national courts to hear and decide the controversies of such corporations arising from its [sic] transactions of interstate commerce . . . ."[102]

c. *Summary*

Article 15, section 10, of the Colorado constitution has been

[95] *Id.*

[96] COLO. CONST. art. 15, § 10 (1876) provides: "No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served."

[97] 113 U.S. at 734 (emphasis added). Colorado cases supporting this interpretation of doing business as a continuous act for qualification are: Craig v. A. Leschen & Sons Rope Co., 38 Colo. 115, 87 P. 1143 (1906); Roseberry v. Valley Bldg. & Loan Ass'n, 35 Colo. 132, 83 P. 637 (1905); Miller v. Williams, 27 Colo. 34, 59 P. 740 (1899); Kindel v. Beck & Pauli Lithographing Co., 19 Colo. 310, 35 P. 538 (1893); Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419, 18 P. 537 (1888); Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 P. 667 (1890).

[98] 156 F. 1 (8th Cir. 1907), *cert. denied,* 212 U.S. 577 (1908).

[99] Ch. 52, § 10, [1901] Colo. Sess. Laws 121.

[100] 156 F. at 6-7. Defendant cited COLO. CONST. art. 15, § 10 (1876).

[101] *Id.* at 16.

[102] *Id.* at 18.

interpreted to be limited to the *carrying on* of business in intrastate commerce. This interpretation, which limits the application of the qualification laws to foreign corporations which commit more than a single act or which are not engaged solely in interstate comerce, has been supported by case law.[103] Thus, the simple conclusion is that "doing business" for qualification purposes is a stricter test requiring more contacts than the test for service of process. Even if a series of contacts is proven, the corporation may still maintain the defense of interstate commerce, but, as noted in *Lilly,* this factor requires exclusivity.

2. Procedure

a. *Abatement*

The heavier burden of proof and the current minimal penalty for failure to qualify are not the only factors inhibiting the litigation of "doing business" for qualification. Along with these is the characterization of the statute as a mere abatement. As noted earlier, if a corporation fails to qualify, it cannot bring a suit in the state until a certificate of authority is obtained. Even in 1907, it was permissible to file the certificate *after* commencement of a suit and thereby alleviate the problem.[104] This procedural maneuver, which eventually eliminated the issue of qualification, was accepted by the Colorado Supreme Court in 1928 when it held that "[n]oncompliance with that statute is a matter in abatement."[105]

The leading and most recent case on this point is *Admiral Corp. v. Trio Television Sales & Service, Inc.*[106] The case involved a foreign corporation which brought suit, but was dismissed from court because it was not qualified to do business in Colorado. After judgment, the plaintiff filed his certificate and brought a new suit on the same claim. The defendant pleaded res judicata.

The Colorado Supreme Court rejected the defendant's plea, and held that where a foreign corporation's suit is dismissed solely on the basis of its failure to file a certificate, maintenance of the suit is not barred by the doctrine of res judicata if such corporation files *after* the dismissal.[107] As in the 1907 case, it was held that "[f]ailure to file the required certificate

[103] *See, e.g.,* Savage v. Central Elec. Co., 59 Colo. 66, 148 P. 254 (1915); Herman Bros. Co. v. Nasiacos, 46 Colo. 208, 103 P. 301 (1909).

[104] International Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299, 92 P. 727 (1907).

[105] Rocky Mt. Seed Co. v. McArthur, 85 Colo. 1, 5, 272 P. 1117, 1119 (1928).

[106] 138 Colo. 157, 330 P.2d 1106 (1958).

[107] *Id.* at 162, 330 P.2d at 1108-09.

served only to abate the action during the time it remained unrecorded."[108] In summary, the court stated:

> The dismissal of an action based exclusively upon a defense which could only abate the action does not in any manner prejudice the right of the plaintiff to bring a second suit on the same claim once the defect which gave rise to the abatement of the first action has been cured.[109]

The result of this case is to encourage a foreign corporation to pay the filing fees and obtain a certificate rather than face lengthy and expensive litigation on the issues of "doing business" and interstate commerce. Furthermore, corporations need no longer fear the pre-1920 repercussions from late filing.

b. *Pleading as a Defense*

Another important procedural point first noted in 1919 is that a "defendant's failure to plead noncompliance [with the qualification statute] amounted to a waiver thereof."[110] This issue appeared more recently in *Zelinger v. Uvalde Rock Asphalt Co.*[111] where a defendant did not raise the issue of plaintiff's failure to qualify until the appellate level. The court dismissed the complaint because the "failure of a foreign corporation to comply with the cited statute goes to its capacity to sue, and is a matter of defense to be pleaded by the defendant in bar of the action."[112] Therefore, although failure to qualify can be an effective means of abating a case, it must be pleaded initially or the defense is waived.

c. *Statute of Limitations*

One final procedural point of importance is the effect of abatement on the statute of limitations. A 1911 case which still stands as valid precedent is *Western Electrical Co. v. Pickett.*[113] Here, in a fact situation similar to the *Admiral* case, the court faced the question: Is the running of the statute of limitations suspended by the attempted institution of the suit before compliance with qualification?

The supreme court answered no, rationalizing that when the plaintiff filed suit it technically could not prosecute because of its failure to qualify. Thus, the statute of limitations

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[108] *Id.*

[109] *Id.* at 163, 330 P.2d at 1109. Note the interesting dissent which analyzes the question of corporate "existence" under COLO. REV. STAT. ANN. § 141-2-1(2) (1953). An analysis of this statute can be found in Capriles, *Business Organization,* 35 N.Y.U.L. REV. 613, 649 (1960).

[110] Watson v. Empire Cream Separator Co., 66 Colo. 284, 285, 180 P. 685 (1919).

[111] 316 F.2d 47 (10th Cir. 1963).

[112] *Id.* at 53.

[113] 51 Colo. 415, 118 P. 988 (1911).

ran until the filing of the certificate and the commencement of the second suit. The court felt that to hold otherwise would "abrogate the only inconvenience or penalty which has been placed upon the non-resident corporation for its failure to comply with the provisions of the act and its violation of our law."[114]

d. *Summary*

The substantive issues involved in qualification and "doing business" appear to be mooted by the procedural doctrine of abatement. The only penalty, that of not being able to bring suit while not qualified, can be remedied without fear of res judicata. The procedure has eliminated this aspect of "doing business" from the Colorado courts since the paying of back fees will certainly amount to less than a litigation of the issue.

If involved in such a suit, one must be aware of two caveats. First, the nonqualification must be pleaded as a defense at the trial level; and second, the statute of limitations will continue to run as long as the corporation is unqualified, regardless of attempted suits in the interim. This last point exemplifies one of the few instances in which the defense of failure to qualify could be an effective strategy.

III. TAXATION

A. *Constitutional Premise*

The power of a state to tax a foreign corporation is limited by the commerce clause of the United States Constitution. When a foreign corporation is faced with a state tax levy, its best defense is to allege the levy places an undue burden on interstate commerce. In deciding the merits of such a defense in the past, the Supreme Court has considered whether the tax was discriminatorily applied, whether it was properly apportioned, and whether there was a sufficient nexus between the state and the corporation. As the Court has succinctly stated, "[t]he simple but controlling question is whether the state has given anything for which it can ask return."[115]

In this note, consideration of the highly complex subject matter of state taxation on interstate commerce is limited to the question of "doing business." To analyze this question, the sales and use tax, franchise tax, and income tax will be reviewed. Within this general scope, the constitutional premise can be summarized as follows:

[114] *Id.* at 424, 118 P. at 991.

[115] Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

> [N]et income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.[116]

Below is a brief summary of questions deemed important by the Supreme Court when analyzing state taxation of foreign corporations:

1. Were the sales arranged through an agent in the taxing state?[117]

2. Did the corporation maintain salesmen or solicitors in the state?[118]

3. Did the corporation solicit entirely through the mail?[119]

4. Did the corporation maintain local stores within the state?[120]

5. Was the taxpayer merely an "itinerant drummer"?[121]

6. Was the tax levied on the "privilege" of engaging in interstate commerce?[122]

7. Does the tax subject the corporation to the burden of "multiple taxation"?[123]

8. Does the tax discriminate so as to provide a "direct commercial advantage to local business"?[124]

The answers to the above-listed questions will determine the sufficiency of the nexus and the fairness of the tax.

B. *Colorado Case Law*

Whether one is susceptible to taxation for "doing business" in Colorado is, with the exception of the franchise tax, not dependent on the qualification issue. A "foreign corporation may escape a state tax [income or sales and use] even though it is qualified to do business in the state."[125] The question of taxation is resolved on the basis of the quality, quantity, and

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[116] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). For general comments on this area, see Note, *Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962); Note, *State Taxation of Multistate Businesses*, 74 YALE L.J. 1259 (1965).

[117] Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); General Trading Co. v. Tax Comm'n, 322 U.S. 335 (1944).

[118] Scripto, Inc. v. Carson, 362 U.S. 207 (1960).

[119] National Bellas Hess, Inc. v. Department of Rev., 386 U.S. 753 (1967).

[120] Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941); Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).

[121] Robbins v. Shelby County Tax. Dist., 120 U.S. 489 (1887).

[122] Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).

[123] J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

[124] Nippert v. Richmond, 327 U.S. 416 (1945).

[125] 1 CCH STATE TAX REP., COLO. ¶ 2-012 (1965).

character of the business transacted in the state plus an analysis of the nature of the tax. Thus, it involves the same factual analysis discussed for service of process and qualification.

Briefly, Colorado cases have held that sales made by an itinerant traveling salesman are not subject to a use tax on the distribution of circulars.[126] Since his business was purely interstate, the levy violated the commerce clause. The court has also stated that taxing a foreign corporation on sales completed outside of the state was violative of the commerce clause. Additionally, taxing a foreign corporation on sales completed outside of the state was held violative of the Constitution, even though the corporation had an office in the state and was selling to Colorado residents.[127] In contrast, a corporation which held no property in Colorado, had never engaged in business in the state, had no office of solicitation, and had never carried on commerce in Colorado, was held liable for income tax on "income received from a source in Colorado."[128] It has also been held that a foreign nonprofit corporation is not entitled to an income tax exemption unless it operates in Colorado "for the benefit of the people of this State."[129]

Colorado case law in the area of taxation is quite old. The cases, standing alone, are too broad to support a detailed analysis, although a few premises can be gleaned from them. To find definitive aid on taxation questions, one must look to the statutes where, for the first time, there appears an explicit definition of "doing business."

C. *Colorado Statutory Law*

1. Sales and Use Tax

In the definition section of the Colorado sales and use tax statute,[130] the phrase "doing business" is defined. Although this definition has yet to be interpreted by the Colorado Supreme Court, it appears that the statute is subject to a valid constitutional challenge.

First, the definition characterizes the leasing, selling, or delivering of tangible personal property by a retail sale for

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126 City of Pueblo v. Lukins, 63 Colo. 197, 164 P. 1164 (1917).

127 Colorado v. American Can Co., 117 Colo. 312, 186 P.2d 779 (1947). Note: the defendant was authorized to do business in Colorado.

128 Arvey Corp. v. Fugate, 129 Colo. 595, 272 P.2d 652, *cert. denied*, 348 U.S. 871 (1954).

129 Young Life Campaign v. Board of County Comm'rs, 134 Colo. 15, 300 P.2d 535 (1956).

130 COLO. REV. STAT. ANN. § 138-5-2(22) (Supp. 1967).

the use, storage, distribution, or consumption within Colorado as "doing business" for the purpose of the statute.[131] Second, a foreign corporation is "doing business" for the purpose of the statute if it maintains in the state, either directly or through its subsidiary, an office, distributing house, salesroom, warehouse, or other place of business.[132] The third and final section will be quoted in its entirety because of the apparent constitutional flaw. "Doing business" is:

> The *soliciting,* either by direct representative, indirect representatives, manufacturers' agents, or *by distribution of catalogues or other advertising,* or by use of any communication media, or by use of the newspaper, radio, or television advertising media, or by any other means whatsoever, of business from persons residing in this state, and by reason thereof receiving orders from, or selling or leasing tangible personal property to, such persons residing in this state for use, consumption, distribution, and storage for use or consumption in this state.[133]

This statute, in its detailed analysis of the phrase "doing business," is a marked improvement over the nondefined areas of service of process and qualification. Unfortunately, the above-quoted section sharply conflicts with a 1967 Supreme Court opinion on taxation in interstate commerce.

In *National Bellas Hess, Inc. v. Department of Revenue,*[134] the Supreme Court confronted the issue of a sales and use tax levied on solicitations made through catalogues. The foreign corporation involved was a Missouri mail order house which sent catalogues twice a year to active or recent customers in Illinois. "Flyers" were also mailed to potential customers in the state. The corporation had no place of business in Illinois, no agents or solicitors in the state, no telephone listing there, and conducted no advertising by means of billboards, radio, or television. The State of Illinois attempted to levy a use tax on the corporation by making it collect and pay taxes on sales made in the state.

The Supreme Court, in ruling against the state, held that the Constitution requires "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax."[135] The Court was particularly concerned with whether *National Bellas Hess* had been afforded

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[131] *Id.* § 138-5-2(22)(a).

[132] *Id.* § 138-5-2(22)(b).

[133] *Id.* § 138-5-2(22)(c) (emphasis added).

[134] 386 U.S. 753 (1967).

[135] *Id.* at 756, *quoting* Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954).

"the protection and services of the taxing State."[136] The main obstacle facing Illinois was the fact that "the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."[137] When challenged, Colorado will be faced with that same obstacle.

This distinction between mail order sellers with retail outlets, solicitors, or property within the state and those who communicate with their customers solely by mail or common carrier was adamantly defended by the Court. Not only was the contact with the state deemed tenuous, the opinion noted that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved."[138]

Obviously, the Colorado statute, which was enacted the same year *National Bellas Hess* was decided, conflicts with this holding in stating that "[t]he soliciting . . . by distribution of catalogues"[139] is transacting business for sales and use tax purposes. In addition to this conflict, the Colorado Supreme Court has held that advertising is too tenuous a contact even for service of process.[140]

Thus, the solicitation section of this definition is open to constitutional attack because of the undue burden on interstate commerce and lack of contact. The remainder of the statute appears valid, and places taxation in its usual position as regards "doing business:" fewer contacts are necessary for service of process, but more are necessary for qualification.

2. Franchise Tax

The current Colorado franchise or license tax,[141] levied on foreign corporations which are qualified and authorized to do business in Colorado, is also subject to constitutional challenge. As noted earlier,[142] section 31-9-4 states that any foreign corporation which qualifies to do business in Colorado shall "enjoy the same, but no greater, rights and privileges as a domestic corporation."[143] However, there is currently a dis-

136 *Id.* at 757.
137 *Id.* at 758.
138 *Id.* at 759.
139 COLO. REV. STAT. ANN. § 138-5-2(22)(c) (Supp. 1967).
140 Safari Outfitters, Inc. v. Superior Court, 167 Colo. 456, 488 P.2d 783 (1969).
141 COLO. REV. STAT. ANN. § 31-10-7 (1963).
142 *See* discussion p. 549 *supra.*
143 COLO. REV. STAT. ANN. § 31-9-4 (1963).

parity between the franchise tax for domestic corporations and the license tax for foreign corporations.

Under section 31-10-6, a franchise tax on *domestic* corporations is itemized as follows:

> A $10 tax on every corporation with an authorized capital stock of $50,000 or less;
> $20 — $50,001 to $150,000
> $40 — $150,001 to $250,000
> $65 — $250,001 to $500,000
> $100 — $500,001 to $1,000,000
> $250 — over $1,000,001.[144]

In contrast to this graduated scale, section 31-10-7 states that all foreign corporations who are qualified to do business in Colorado are subject to a flat $100 license tax in lieu of a franchise tax.[145] This open discrimination in taxation contradicts the consitutional premises which dominate this area of the law.

In 1905, the Colorado Supreme Court upheld a similar statute which permitted discrimination between domestic and foreign corporations on taxation of authorized capital stock.[146] The court based its opinion on a detailed differentiation between "excise" and "property" taxes. On appeal, the United States Supreme Court reversed and held the statute unconstitutional as impairing the contractual relationship between the corporation and the state.[147]

At that time, Colorado had a statute, similar to the current section 31-9-4, which granted a foreign corporation rights equal to those of a domestic corporation if the foreign corporation had qualified to do business in the state.[148] The Supreme Court characterized this promise as being contractual: the state would give the foreign corporation equal rights in return for formal qualification. Because of this contract, the Court disagreed with the Colorado Supreme Court's careful delineation of "excise" and "property" taxes, and held:

> Whatever be the name or nature of the tax, it must be measured in amount by the *same rate* as is provided for the domestic in-

144 COLO. REV. STAT. ANN. § 31-10-6 (1963).

145 *Id.* § 31-10-7.

146 American Smelting & Refining Co. v. People *ex rel.* Lindsley, 34 Colo. 240, 82 P. 531 (1905). The statute involved was ch. 3, §§ 64-66, [1902] Colo. Sess. Laws 73-74 which placed a 2 cent levy on every $1000 of capital stock for domestic corporations and a 4 cent tax on the same amount for foreign corporations. If the foreign corporation's stock had a par value of less than $1, the tax was 2½ cents per $1000 of stock.

147 American Smelting & Refining Co. v. Colorado *ex rel.* Lindsley, 204 U.S. 103 (1907).

148 Ch. 19, § 23, [1877] Colo. Sess. Laws 151 (General Laws of Colorado).

> stitution, and if the latter is not taxed in that way neither can the State thus tax the foreign corporation.[149]

In further clarifying its position, the Court noted that "[t]his is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation.[150]

Since this case is still recognized as valid law, it would appear that the franchise tax in Colorado is subject to attack on the ground that it impairs the obligation of the contract existing between the state and a qualified foreign corporation under section 31-9-4. As the Court said in *American Smelting*:

> [T]he liabilities, restrictions and duties imposed upon domestic corporations constitute the *measure and limit* of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the State.[151]

This equilibrium is not expressed in sections 31-10-6 and -7, and should be challenged by any foreign corporation subjected to the $100 levy or any domestic corporation now paying over $100 in franchise taxes.

3. Income Tax

a. *Prior to 1951*

Prior to 1951, the Colorado income tax law governing corporations required a 4 percent levy on "the entire net income . . . derived from property located and business transacted within this state during the taxable year."[152] Such an income tax statute creates problems of apportionment: What part of the corporation's income was derived from "doing business" in Colorado?

An example of the Colorado Supreme Court's approach to apportionment is *Cruse v. Stayput Clamp & Coupling Co.*[153] The defendant corporation had its only office and manufacturing plant in Colorado, and it maintained no other inventory. The company received orders in Colorado and shipped them "to the destination, sometimes c.o.d., sometimes on open account, sometimes f.o.b. Denver, sometimes f.o.b. destination."[154] The state tax commissioner argued that defendant's entire net income equaled his net income in Colorado for section 2(b). The corporation answered by characterizing its Colorado net

[149] 204 U.S. at 115 (emphasis added).
[150] *Id.* at 114.
[151] *Id.* at 113 (emphasis added).
[152] Ch. 175, § 2(b), [1937] Colo. Sess. Laws 679.
[153] 113 Colo. 254, 156 P.2d 397 (1945).
[154] *Id.* at 257, 156 P.2d at 398.

income as sales "completed by delivery in Colorado to Colorado purchasers."[155]

After reviewing various decisions from other states, the court concluded that the tax commissioner's assessment was correct and upheld the following principle:

> [A] state may impose a nondiscriminatory tax on net income derived from transactions in interstate commerce as well as from other sources without violating any constitutional provision.[156]

In contrast to this case, *Colorado v. American Can Co.*[157] held that a foreign corporation which had carefully selected its contacts could not be taxed on its total net income. Here the tax assessment was based on income derived from retail sales made to customers in Colorado. The defendant argued that the orders, although taken in Colorado, were transmitted to New Jersey for acceptance. The product was shipped from warehouses outside of Colorado f.o.b. to a point of delivery also outside the state. There, the product was picked up by carrier for delivery to a retail purchaser in Colorado. The corporation was authorized to do business in Colorado and maintained a Colorado warehouse from which it made sales to local customers.[158]

The court, in seeking to apportion the income derived from transacting business in the state, broke the business into national, totally Coloradan (from the local warehouse), and business in goods delivered outside the state for Colorado customers. The court held that the corporation's net income for the state tax was to be limited to the sales made from the Colorado warehouse.

Thus, the argument made by the corporation in *Stayput Clamp* appears to have found acceptance in *American Can.* The court rationalized this difference by noting that the corporation in *Stayput Clamp* had all of its *property* in Colorado, and therefore the "transacting business" test could be avoided.

b. *After 1951*

In 1951, the income tax law was altered to accelerate the corporate tax to 5 percent.[159] Complementing this increment was a change in the statutory language. The amended statute taxes the following:

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[155] *Id.* at 258-59, 156 P.2d at 399.

[156] *Id.* at 264, 156 P.2d at 401.

[157] 117 Colo. 312, 186 P.2d 779 (1947).

[158] Note that under COLO. REV. STAT. ANN. § 138-5-2(22) (Supp. 1967) this type of transaction would be subject to sales and use tax.

[159] Ch. 196, § 2(b)(2), [1951] Colo. Sess. Laws 453.

> [T]he net income of every corporation *derived from sources within this state* . . . . Income from sources within this state includes income from tangible or intangible property located or having a situs in this state and income from *any activities carried on* in this state, regardless of whether carried on in intrastate, interstate or foreign commerce.[160]

This new language, which would seem to cover the *American Can* situation, is clearly differentiated from the old statute in *Arvey Corp. v. Fugate*.[161] Here the director-inventor of a corporation left the business, took some key employees with him, and created a new company authorized to do business in Colorado. The original corporation filed an action to enjoin the activities of this new business on the basis that the director-inventor was bound contractually and as a fiduciary to the plaintiff. In winning the suit, the corporation received all the gains and profits that the new Colorado corporation had obtained during a certain accounting period.[162] The state tax commissioner promptly stepped in and levied an income tax on these gains and profits.

In defense, the corporation argued that it was never domiciled in Colorado, had no property in the state, had never engaged in business or carried on commerce in Colorado, and had no office there. It further contended that it had never received income from sources within the state, directly or indirectly, and the rights obtained from the earlier litigation were an intangible whose situs was the domicile of the defendant.

In analyzing the new statute, the court held that "income from sources within this state" was to be interpreted as "broad and all inclusive."[163] The previous cases of *Stayput Clamp* and *American Can* were held to be inapplicable because they used the older test of "business transacted within the state" while *Fugate* involved the new statute's "income from sources within the state." Note also that "doing business" is no longer the test but has been replaced by the carrying on of any activity.

The court held the source of the income to have its situs at the location of the business activity. The conclusion was that the "monies it received was [*sic*] income; that such income constituted the profits from the operation of a Colorado corporation; and therefore the source of the income was confined strictly to Colorado."[164]

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[160] *Id.* § 2(b)(1) (emphasis added).
[161] 129 Colo. 595, 272 P.2d 652 (1954), *cert. denied*, 348 U.S. 871 (1954).
[162] Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 P.2d 977 (1951).
[163] 129 Colo. at 599, 272 P.2d at 655.
[164] *Id.* at 600, 272 P.2d at 655.

Although there have been no cases interpreting the current section 138-1-3, this case gives a definite preview of what a foreign corporation can expect when trying to avoid the state's income tax. As with the 1965 long arm statute, this new law definitely expands the state's power. "Income derived from sources" within the state will probably be interpreted as liberally as the "arising from" test in the tortious act area. As with tort, it is no longer necessary to prove that the foreign corporation was actually "doing business" in the state. Today, the "transaction of business" is no longer in the statute. The test has been broadened to "activities carried on in this state."[165] Thus, the tax commissioner's burden of proof has been minimized.

D. *Summary*

The taxation question is still limited by the Supreme Court cases noted earlier. Any tax is vulnerable to an attack on the grounds of discrimination or undue burden on interstate commerce. The "doing business" test for sales and use taxation requires more proof than the "doing business" test for service of process but less than the "doing business" test for qualification. Franchise taxation is limited to corporations already qualified to do business, and, for income tax purposes, the "doing business" test has been eliminated.

As discussed, it appears that both the Colorado license tax and the definition of "doing business" for sales and use taxation are subject to basic constitutional challenges. The former is discriminatory and impairs the state's contractual obligation, while the sales and use tax extends the power of the state beyond its boundaries because of a lack of proper nexus and interference with interstate commerce.

CONCLUSION

Although "doing business" can never be precisely defined, this note has attempted to narrow the scope of the phrase as it applies in Colorado. There are certain statutes or cases which have managed to directly connect the term with the three areas of conflict. In service of process, the "tortious act" test has grown since its 1965 inception through the "ultimate use" standard outlined in *Vandermee* and *Czarnick*. For contract, the possible expansion of jurisdiction through the phrase "arising from" may alter the balancing of contacts test which has been adhered to in the past. The issue of qualification has been largely mooted in Colorado by the relaxed penalties and

[165] COLO. REV. STAT. ANN. § 138-1-35 (Supp. 1965), *as amended* (Supp. 1969).

the judicial interpretation of abatement in the *Admiral Corp.* case. The sales and use tax statute which defines "doing business" appears to place an undue burden on interstate commerce through its inclusion of solicitation as a substantial contact. The licensing tax is also subject to constitutional challenge because of its obvious discrimination when compared to the franchise tax on domestic corporations. Finally, the income tax statute has eliminated the "doing business" test in order to adopt the more expansive standard of "activities carried on." This, when combined with the potentially broad language of "income derived from," implies a future extension of Colorado's taxation on the income of foreign corporations.

Thus, the general trend in Colorado has been to expand the state's power over foreign corporations by bringing them into local courts and levying state taxes upon these businesses. With the sole exception of the qualification standards, the legislature and the courts are unanimous in their approval of treating out-of-state corporations more like local citizens than foreign ones. In the process of acquiring this power, certain constitutional restrictions have apparently been ignored.

Roger W. Arrington

COMMENT

THE COLORADO GOVERNMENTAL IMMUNITY ACT: A PRESCRIPTION FOR REGRESSION — TORTS — COLO. REV. STAT. ANN. §§ 130-11-1 to -17 (Supp. 1971)

INTRODUCTION

FOR centuries the doctrine of sovereign or governmental immunity has insulated both the individual public official and the corporate personality of state and local governments from suit. Under this doctrine the state and its political subdivisions might be sued only if they consented to such suit, and until recently this requirement of consent was an absolute maxim of law. In its earliest application in English common law,[1] the doctrine of sovereign immunity barred the recovery of a plaintiff aggrieved by a sovereign defendant in either tort or contract[2] solely because of the defendant's public character. The merits of the cause of action and the equitable considerations which might favor compensation were irrelevant.

Such injustice persisted with the doctrine's appearance in American jurisprudence.[3] But American courts were quick to recognize these injustices, and soon began to modify the doctrine's operation in an effort to mitigate its harsh consequences. Two approaches to such modification emerged. The first was to define the sovereignty of public entities in such a way as to exclude some portion of the entities' functions from the general class of sovereign activity. Thus, where an actionable harm was caused by a public employee while engaged in an activity which, though "public" by definition, was not deemed "sovereign," the public entity could not avail itself of sovereign immunity,[4] but was instead held liable under the theory of respondeat superior.[5] The second approach was to construct

[1] For a review of the historical development of sovereign immunity in English common law, see Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926).

[2] This comment will deal primarily with immunity from a suit in tort. Colorado, like most states, negatived its immunity doctrine as to contract actions under the fiction of "inferred consent" (the court inferred the government's consent to suit from the act of contracting itself). *See* Ace Flying Service, Inc. v. Colorado Dep't of Agric., 136 Colo. 19, 314 P.2d 278 (1957). *See also* Colorado Racing Comm'n v. Brush Racing Ass'n, Inc., 136 Colo. 279, 316 P.2d 582 (1957).

[3] The evolution of sovereign immunity in early American common law is treated in depth by Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[4] *See* subsection I.A., *What Is Sovereign?* pp. 571-75 *infra*.

[5] *See generally* Williams, *Vicarious Liability: Tort of the Master or of the Servant*, 72 L.Q. REV. 522 (1956).

an elaborate fiction by which the public entity was said to have "waived" immunity or to have "consented" to the suit. Such consent was inferred from the purchase of liability insurance by the governmental defendant.[6] Unfortunately, these common law exceptions to sovereign immunity proved difficult to administer as the courts found little guidance in reason to distinguish the sovereign from the nonsovereign act. Instead of eradicating the injustice of sovereign immunity, the exceptions merely compounded the injustice with confusing distinctions. By the mid-20th century the uncertainty of the immunity doctrine's application under these exceptions had become a judicial nightmare, and abrogation of the doctrine seemed assured.

Between 1942 and 1945, New York became the first state to begin piecemeal legislation to take sovereign immunity out of the state's common law;[7] several other states followed.[8] In March 1971, Colorado joined this growing minority with the supreme court's opinions in *Evans v. Board of County Commissioners*[9] and two companion cases.[10] By these decisions the court emphatically erased all features of governmental immunity from Colorado's common law. Further, the decisions sounded a challenge to the Colorado General Assembly to provide for the financial protection of public entities which now stood nakedly open to suit. In the court's view this might have been accomplished by the purchase of liability insurance or by the legislative reinstatement of sovereign immunity.[11] The general assembly chose the latter alternative by enacting the Colorado Governmental Immunity Act.[12]

Although the Act does restore sovereign immunity as a general rule in suits against the state and its political subdivisions,[13] it still embraces the central policy considerations of *Evans*, as indicated in the Act's Declaration of Policy:

> It is recognized by the general assembly that the doctrine of sovereign immunity, whereunder the state and its political subdivisions are often immune from suit for injuries suffered by private persons, is, in some instances, an inequitable doctrine.[14]

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[6] *See* subsection I.B., *What Is Consent?* pp. 575-76 *infra*.

[7] The process of abrogation including legislative and judicial interaction is reviewed in Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363, 1391 (1954).

[8] A list of these states is found in Evans v. Board of County Comm'rs, 482 P.2d 968, 969 n.1, 972 n.12 (Colo. 1971).

[9] 482 P.2d 968 (Colo. 1971).

[10] Flournoy v. School Dist. No. 1, 482 P.2d 966 (Colo. 1971); Proffitt v. State, 482 P.2d 965 (Colo. 1971). The opinion rendered by the court in *Evans* is conclusive as to these decisions as well.

[11] The court outlined these alternatives in Evans v. Board of County Comm'rs, 482 P.2d 968, 972 (Colo. 1971).

[12] COLO. REV. STAT. ANN. §§ 130-11-1 to -17 (Supp. 1971).

[13] *Id.* § 130-11-6(1)(a).

[14] *Id.* § 130-11-2.

However, in spite of this recognition, the general assembly has failed to accomplish its primary objective — to provide the courts with a realistic approach to governmental liability. Instead, as this comment will demonstrate, the new Act is a regression which will force the courts back into the injustice and uncertainty of pre-*Evans* common law. Before the full impact of this regression may be appreciated, however, the reader must first understand the nature of sovereign immunity and the injustice and uncertainty incident to its application under common law prior to *Evans*.

I. The Development of the Pre-*Evans* Doctrine

As the doctrine of sovereign immunity unfolded in American cases, a set of universal rules grew up for defining the extent of immunity enjoyed by both the public entity and its employees.[15] In the context of tort law, the doctrine protected most governmental employees from liability for injury resulting from "foreseeable conduct" within their "scope of employment."[16] The employee would be held personally liable only if his conduct exceeded this scope of employment. Even the traditional limits of respondeat superior defining scope of employment were expanded beyond conventional principles as the foreseeability of official conduct came to encompass more and more behavior previously considered outside the scope of employment.[17]

The public entity's liability under this formulation was truly a situation of "heads, I win — tails, you lose." If the wrong committed by the public employee was caused by conduct foreseeably within the scope of employment, then sovereign immunity would protect both the public entity and its employee. If the conduct was found to be outside the scope of employment, then the employee might be held personally liable, but clearly his employer would not be liable under any theory of respondeat superior.[18]

In Colorado, immunity was first recognized in the 1893 decision, *Board of County Commissioners v. Bish*,[19] which shielded local governments from suit. Immunity for the state

[15] Both the general rules and particular idiosyncrasies of various state formulations are found in Leflar & Kantrowitz, *supra* note 7, at 1391.

[16] *See* W. Prosser, Law of Torts §§ 131-32 (4th ed. 1971).

[17] Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263 (1937).

[18] The classical statement of these two rules in federal common law is Poindexter v. Greenhow, 114 U.S. 270 (1884). Colorado's common law on this point is reviewed in Faber v. State, 143 Colo. 240, 353 P.2d 609 (1960).

[19] 18 Colo. 474, 33 P. 184 (1893).

was established 2 years later when the supreme court decided *In re Constitutionality of Substitute for Senate Bill No. 83*,[20] better known as the *Benedictine Sisters* case. Without discussing the justification for the doctrine, the court simply stated:

> We recognize the doctrine that, without constitutional or legislative authority, the state in its sovereign capacity cannot be sued. No such authority exists in this state. This being so, no liability upon contract or tort, if any there may be, can be enforced against the state in any of its courts.[21]

In the *Benedictine Sisters* case, the appellant challenged the *constitutionality* of sovereign immunity, at least as it affected property interests. The challenge was premised upon the Colorado constitutional provision that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation."[22] Since the appellant's property had been taken incident to a public works project and since no compensation, just or otherwise, had been received, the claim appeared sound. The supreme court, however, avoided this compelling constitutional argument by ruling in favor of the state on grounds of sovereign immunity.[23] The constitutional validity of a doctrine which so plainly interfered with the exercise of this right to just compensation was an issue virtually ignored by the court.

The court continued to ignore this issue for nearly half a century. Finally, in its 1939 decision, *State v. Colorado Postal Telegraph-Cable Co.*,[24] the supreme court ruled that legislative consent to sue was a prerequisite to the court's jurisdiction over actions against the state. This was so because the extent and nature of public liability was a matter vested to the exclusive concern of the legislature.[25] The court felt incompetent to "legislate" such compensation for the plaintiff, as this would clearly violate the separation of powers clause. Moreover, the court felt powerless to compel the legislature to affirmatively perform its own duty, for such a mandate was profoundly different from declaring a *positive* act of the legislature unconstitutional.

This reasoning ignored the obvious competence vested in the judiciary to declare the taking of property without just

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[20] 21 Colo. 69, 39 P. 1088 (1895).

[21] *Id.* at 72, 39 P. at 1089.

[22] COLO. CONST. art. II, § 15.

[23] 21 Colo. at 72, 39 P. at 1089.

[24] 104 Colo. 436, 91 P.2d 481 (1939).

[25] This rationale was used often in early federal common law. *See* United States v. Lee, 106 U.S. 196, 206 (1882).

compensation, in and of itself, an act beyond the constitutional authority of either legislative or executive power. Ultimately, the Colorado Supreme Court surrendered to this logic in *Boxberger v. State Highway Department*.[26] In this case the court carried the constitutional argument to its logical conclusion by finding sufficient grounds for jurisdiction over suits against the state in the constitution itself:

> This judicial power is conferred by [the constitution] and we see no reason to invoke a different doctrine as to remedy for the citizen whose property is wrongfully held by the sovereign or any other source of imposition. The rights of a citizen remain the same whether they collide with an individual or the government, and judicial tribunals were wisely established to correct such matters without the individual being relegated to the position of no other remedy except to appeal to a legislature, maybe to no avail, as all the people, or the citizens, are, in fact, the sovereign under our desirable form of government.[27]

Boxberger established nothing more than the unconstitutionality of sovereign immunity when raised as a defense to actions seeking enforcement of constitutional prohibitions against the uncompensated *taking of property*. As to all other actions, however, sovereign immunity remained an absolute rule.

This exception to sovereign immunity was the product of a much larger process, one by which the absolute quality of the immunity doctrine had begun to erode. The courts in most jurisdictions[28] were retreating from the purist conception of sovereign immunity and embarking upon the long climb toward abrogation of the doctrine. As mentioned earlier,[29] this process utilized two primary avenues of retreat, one requiring distinctions between sovereign and nonsovereign acts and the other calling for waiver of immunity where the public entity had procured liability insurance. Each of these will be discussed in turn.

A. *What Is Sovereign?*

The fundamental injustice of sovereign immunity was that the plaintiff was barred from recovery for an otherwise actionable harm merely because the defendant was a public and not a private institution. This injustice was accentuated by the *personal* immunity of the public employee responsible for

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[26] 126 Colo. 438, 250 P.2d 1007 (1952).

[27] *Id.* at 441, 250 P.2d at 1008.

[28] South Carolina was the only jurisdiction which consistently refused to find any common law liability. *See* Irvine v. City of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911).

[29] *See* pp. 567-68 *supra*.

the plaintiff's harm,[30] since the possibility of an alternative defendant was thereby negatived.

By the mid-19th century the courts began to respond to these injustices by the development of the famous (or infamous) governmental-nongovernmental distinction.[31] New York was first to carve out such an exception to sovereign immunity in the landmark case, *Bailey v. City of New York*.[32] The plaintiff complained of damage incurred because of the city's allegedly negligent construction of a dam across a river. The court distinguished between the "private" and "public" activities which are carried on by government. Because the construction of a dam was deemed "private" or "proprietary," the defendant was unable to escape liability under the veil of the immunity doctrine.

Similarly, in *McCarthy v. City of Syracuse*,[33] the New York Court of Appeals ruled that those duties of public officials, though imposed by law, which were "ministerial" in nature were not the same as duties incident to the general authority of the sovereign. Rather, they were duties which were somehow not of a governmental character, and if injury resulted from the negligent performance of such duties, the municipal corporation and *its officials* could be held liable in tort.

The lead of New York was followed by Wisconsin,[34] Rhode Island,[35] and Oregon.[36] Then in 1904, Colorado adopted the New York rule for public liability in the decision of *Veraguth v. City of Denver*.[37] The court, speaking of municipal corporations, declared:

> One class of its powers is of a public and general character, to be exercised in virtue of certain attributes of sovereignty delegated to it for the welfare and protection of its inhabitants; the other relates only to special or private corporate purposes, for the accomplishment of which it acts, not through its public officers as such, but through agents or servants employed by it. In the former case its functions are political and governmental, and no liability attaches to it either for nonuser or misuser of a power;

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[30] Some states limited personal immunity to "superior officers." These states included California, Utah, Arizona, and some New England states. *See, e.g.*, Dawson v. Martin, 150 Cal. App. 2d 379, 309 P.2d 915 (1957).

[31] The terms "governmental" and "nongovernmental" are used here generically. Some cases refer to a public-private test, others to governmental-proprietary distinctions.

[32] 3 N.Y. 531, 38 Am. Dec. 669 (1842).

[33] 46 N.Y.S. 194 (App. Div. 1871).

[34] Hayes v. Oshkosh, 33 Wis. 314, 14 Am. R. 760 (1873).

[35] Aldrich v. Tripp, 11 R.I. 141, 23 Am. R. 434 (1875).

[36] Wagner v. City of Portland, 40 Ore. 389, 60 P. 985 (1900).

[37] 19 Colo. App. 473, 76 P. 539 (1904).

> while in the latter, it stands upon the same footing with a private corporation, and will be held to the same responsibility with a private corporation for injuries resulting from its negligence.[38]

In theory, the rationale supporting such distinctions rested in the court's conception of sovereignty which was seemingly designed to permit recovery by the plaintiff whenever possible, but precluding such recovery whenever the sovereign power of government might be "usurped" or interfered with.[39] To grant a remedy against the state when its injury-producing activity was governmental (*i.e.*, sovereign per se) would constitute the imposition of a standard of conduct upon the functioning of sovereign authority. This suggested a form of *external* control or regulation over the exercise of sovereignty. Such a remedy was then clearly improper.[40] But if the activity was merely proprietary or nongovernmental, no usurpation of sovereign power would be effected by permitting a private cause of action, and governmental immunity in such cases was less essential to the smooth operation of government.

Similarly, the discretionary-ministerial test, applied to the public officials' personal liability, was seen as a distinction between "sovereign" and "less-than sovereign" acts. This distinction rested on the theoretical assumption that a public employee engaged in the *determination* of sovereign policy must have the freedom of action to effectively exercise sovereign authority, hence he was said to act in his own *discretion* as a sovereign agent. To avoid usurpation of, or interference with, this sovereign agency, the employee was held personally immune. In contrast, the public employee whose acts were classified as ministerial was *not* immune from suit because he was engaged in the *implementation* of sovereign policy, and such implementation was considered inherently less sovereign or perhaps less necessary to the unhampered exercise of sovereignty.[41] In this manner the discretionary-ministerial distinction was treated as a subset of the more general governmental-nongovernmental test.

This reasoning worked well in theory; yet in practice the

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[38] *Id.* at 477, 76 P. at 540-41.

[39] This "usurpation" and interference rationale was used in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

[40] This reasoning is tersely embodied in a remark by Justice Holmes: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

[41] This distinction between determination and implementation of sovereign policy is set forth in Note, 38 MICH. L. REV. 1344 (1940).

courts found substantial difficulty in arriving at general rules for making these distinctions meaningful. The difficulty arose from the interactive character of the distinctions. Conclusions under one distinction depended, in part, upon conclusions reached under the other. The court first decided whether the public entity was, with respect to the harm-producing activity, involved in a governmental or nongovernmental activity. If governmental, the public entity was immune, irrespective of the personal liability of its employee.[42] The employee was personally liable then only if his conduct was ministerial or fell outside the scope of employment.[43] If the public employer was classified as nongovernmental, it was generally subject to liability and its employee could not avail himself of his employer's immunity.[44] However, if the employee committed a tortious wrong by conduct characterized as discretionary, he was personally immune and the public entity could vicariously assert his immunity in its own defense.[45] This meant that the public entity was subject to liability only when *all* of three conditions were met — (1) its general activity was deemed proprietary and not governmental, (2) its employee's injury-producing conduct was ministerial and not discretionary in character, and (3) its employee's conduct, consistent with the doctrine of respondeat superior, was within the scope of his employment.[46]

The complexity of this formulation was compounded by the difficulty in defining such terms as governmental or nongovernmental function and discretionary or ministerial acts.[47]

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[42] The Colorado case law representing this rule is reviewed in Malvernia Inv. Co. v. City of Trinidad, 123 Colo. 394, 229 P.2d 945 (1951).

[43] *See* City & County of Denver v. Madison, 142 Colo. 1, 7, 351 P.2d 826, 829 (1960). The "scope of employment" test should be distinguished from the immunity tests since an agent would be personally liable, and the principal not liable, for torts committed by the agent's conduct outside the scope of employment, irrespective of the public or private character of that employment.

[44] *See* City & County of Denver v. Spencer, 34 Colo. 270, 82 P. 590 (1905).

[45] *See* Canon City v. Cox, 55 Colo. 264, 133 P. 1040 (1913). *See also* W. PROSSER, *supra* note 16, §§ 131-32.

[46] Although the distinctions between these three conditions were often blurred or not explicitly recognized, the textual statement is a valid summary of the requirement to find liability. If any one of the elements (governmental character, discretionary employee activity, employee action within the scope of employment) was recognized as missing, the public entity escaped liability.

[47] The Colorado case law in this area is typical of the confusion incident to attempted distinctions between these terms. *Compare* City & County of Denver v. Austria, 136 Colo. 454, 318 P.2d 1101 (1957) *with* Williams v. City of Longmont, 109 Colo. 567, 129 P.2d 110 (1942) (governmental-nongovernmental distinction applied to operation of public facilities). Also *compare* Moses v. City & County of Denver, 89 Colo. 609, 5 P.2d 581 (1931) *with* City & County of Denver v. Mason, 88 Colo. 294, 295 P. 788 (1931) (discretionary-ministerial distinction applied).

The finding of a "general statutory grant" authorizing particular functions of government was used as a criterion for deciding the governmental-nongovernmental issue.[48] But the vagueness of this criterion made it all but useless for anything but the most extreme cases.[49] The ministerial-discretionary distinction did little to diminish the confusion, because in most jurisdictions it operated only after a finding that the public entity was engaged in a governmental activity.[50] Mr. Justice Traynor, in reviewing the California rule on public liability, observed:

> [The immunity doctrine] has become riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality. Some who are injured by governmental agencies can recover, others cannot: one injured while attending a community theater in a public park may recover, but one injured in a children's playground may not . . . .[51]

B. *What Is Consent?*

In addition to the interpretive difficulties created by the governmental-nongovernmental distinction, the courts encountered more problems in accomplishing selective waiver of sovereign immunity by other means, most notably through the consent proviso of the doctrine. Since the immunity doctrine permitted suits against the state and its political subdivisions whenever these entities consented to such actions, it seemed logical enough to create exceptions to immunity by expanding the meaning of such consent. Traditionally, this consent required either legislative waiver of immunity or voluntary submission of the public entity to the jurisdiction of the court wherein the complaint had been filed. But in a series of cases beginning with an Illinois decision, *Molitor v. Kaneland Community Unit District No.* 302,[52] a curious new method of consent was devised. Where the public entity procured any liability insurance, it was deemed to have waived its claim to sovereign immunity to the extent of the policy limits.[53] This applied as to *all* actions brought against the governmental entity. Thus the governmental unit which purchased insurance to cover potential torts

[48] *See* McIntosh v. City & County of Denver, 98 Colo. 403, 55 P.2d 1337 (1936).

[49] *See* Abeyta v. City & County of Denver, 165 Colo. 58, 437 P.2d 67 (1968) (discussing the governmental-nongovernmental distinction in the context of the city's exercise of police power under a general statutory grant).

[50] This includes Colorado. *See* City & County of Denver v. Maurer, 47 Colo. 209, 106 P. 875 (1910).

[51] Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (abrogation of sovereign immunity in California) (court's citations omitted).

[52] 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

[53] *Id.*

arising from *nongovernmental* activities found that it had partially waived its immunity as to *all* activities — including those which were heretofore clearly governmental and immune, absent the insurance.[54]

In the final analysis, the doctrine of sovereign immunity under the governmental-nongovernmental and discretionary-ministerial distinctions was a veritable judicial quagmire. Even a conceptually separate exception to immunity, such as the insurance-waiver approach just outlined, became impossible to administer effectively because of these distinctions. They were the culprit, the ultimate cause of uncertainty and confusion in the common law.[55] Moreover, the two tests failed to answer the other critical need in the law of sovereign immunity, namely the need for greater *justice*. Whereas prior to the governmental-nongovernmental and discretionary-ministerial distinctions, an aggrieved party might not recover for harm he suffered because the defendant was a public entity, now a plaintiff's recovery depended upon the general character of the tortfeasor's function. Neither of these criteria of liability bore any rational relationship to the actual "culpability" of the defendant. Ultimately, the denial of a just demand for compensation under the new tests was as bitter a pill to swallow as under the original sovereign immunity doctrine.[56]

II. ABROGATION OF THE DOCTRINE: THE *Evans* DECISION

By the time New York began to progressively uproot its immunity doctrine during the early 1940's,[57] nearly every American jurisdiction had experimented with some form of selective waiver of immunity. By the late 1950's it was quite apparent that these experiments were failures. The problems which plagued the governmental-nongovernmental and discretionary-ministerial distinctions had become universal. Abrogation seemed inevitable.

New York stood as a lone pioneer in the field of abrogation until 1957, when Florida repealed its immunity doctrine in *Hargrove v. Town of Cocoa Beach*.[58] This was a wrongful death

[54] Although Colorado did not follow this approach, it would have been possible under the insurance-waiver provisions of COLO. REV. STAT. ANN. § 123-30-11 (Supp. 1965).

[55] Justice Frankfurter offered his evaluation of the governmental-nongovernmental distinction in his majority opinion in Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[56] An excellent comment on the justice of these common law tests is found in Gellhorn & Shenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947).

[57] *See* p. 568 *supra*.

[58] 96 So. 2d 130 (Fla. 1957).

action brought by the widow of a prisoner killed during a fire in a locked and unattended jail. In permitting recovery the Supreme Court of Florida explicitly limited its denial of immunity to municipal corporations:

> We . . . feel that the time has arrived to declare this doctrine anachoristic [*sic*] not only to our system of justice but to our traditional concepts of democratic government. . . . Affirmatively we hold that a municipal corporation may be held liable for the torts of police officers under the doctrine of respondeat superior.[59]

A number of other jurisdictions followed Florida with judicial decisions and legislative enactments, varying from mere expansion of previous waiver rules to total abrogation of immunity.[60] Then, in March 1971, Colorado became the eighteenth state to severely alter governmental immunity in favor of liability.[61] In *Evans v. Board of County Commissioners*,[62] the plaintiff brought an action in negligence for an injury sustained in a fall allegedly caused by defective steps of the El Paso County Courthouse. The trial court ruled that governmental immunity precluded any recovery, and the plaintiff brought an appeal on the sole issue of whether immunity in such cases should continue in Colorado. With two dissents the supreme court ruled that such immunity should no longer operate. Mr. Justice Groves remarked in his majority opinion:

> Obviously, there is ample authority to continue application of the doctrine, and there is an abundance of authority to overturn it. A majority of us simply think that the doctrines are causing too great a degree of injustice.[63]

The dissenting opinions of Justices Day and Kelley are substantially aimed at the lack of judicial restraint evidenced by the majority in overruling principles which the court had "pronounced and repronounced . . . through the past many years."[64] The dissenters emphatically felt the majority had overstepped the limits of its competence and that the general assembly was the only proper forum in which to abrogate governmental im-

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[59] *Id.* at 132.

[60] For a review of these legislative and judicial interactions see Van Alstyne, *Governmental Tort Liability: Judicial Law Making in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963). For more recent developments, including a proposal by the American Bar Association and the Administrative Conference of the United States to amend the Administrative Procedure Act so as to eliminate the remaining vestiges of federal sovereign immunity see K.C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 27.00 to .10 (Supp. 1971).

[61] The first 17 states are listed in Evans v. Board of County Comm'rs, 482 P.2d 968, 969 n.1, 972 n.12 (Colo. 1971).

[62] 482 P.2d 968.

[63] *Id.* at 970.

[64] *Id.* at 973.

munity. However, Justice Groves provides an adequate rebuttal to this accusation of "judicial legislating."[65] In recalling that the doctrine was originally judge-made, Justice Groves comments: "the effect of this opinion . . . is simply to undo what this court has done and leave the situation where it should have been at the beginning, or at least should be now: in the hands of the General Assembly . . . ."[66]

Although the majority recognizes the proper role of the legislature, and indeed invites legislative action,[67] it also recognizes the simple fact that what is "created" by the judiciary may be dismantled by it. It is true that in the more than 75 years since Colorado adopted immunity in *Bish,* the legislature may have acted numerous times in ways demonstrating a tacit recognition of governmental immunty, but never had such bare reliance bordered on codification of the doctrine.

Despite the variety of arguments, historical and contemporary,[68] offered by the majority in support of abrogating immunity, the ultimate logic of the *Evans* opinion seemingly turns on the court's recognition of the immunity doctrine's obsolescence:

> Some courts and writers, while not wishing to state that the older decisions were wrong when decided, take the position that the intervening vicissitudes of society have necessitated a change in the law. We agree with these points of view.[69]

By *Evans,* the supreme court set the stage for the general assembly's response.

III. FROM REASON TO REGRESSION

A. *The Legislative History of the Act*

In *Evans* and its two companion cases, the Colorado Supreme Court delayed the prospective effect of their decisions until after June 30, 1972, to permit the legislature adequate time to act in response to the decision: "If the General Assembly wishes to restore sovereign immunity and governmental immunity in whole or in part, it has the authority to do so."[70]

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[65] For an evaluation of "judicial legislating" in those jurisdictions which were in the fore of abrogation, see Littlefield, *Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity,* 9 ST. LOUIS L.J. 56 (1964).

[66] 482 P.2d at 971.

[67] *Id.* at 972.

[68] These arguments included a discussion of the ancient but distorted maxim, "the king can do no wrong." This autocratic maxim's hostility with American political ideology is examined in Barry, *The King Can Do No Wrong,* 11 VA. L. REV. 349 (1925).

[69] 482 P.2d at 970.

[70] *Id.* at 972.

Additionally, the court sought to provide the state with sufficient time to secure the liability insurance needed until the legislature might act.[71]

The general assembly had been preparing for several years to face the question of governmental immunity and responded promptly to the *Evans* decision. From reference to the Colorado Legislative Council's report, "Governmental Liability in Colorado,"[72] published in 1968, it is evident that the legislature's response could have taken any of three forms.

First, the state and its political subdivisions might have been made subject to open-ended liability, with no greater legal protection than a private defendant. There were two ways to accomplish this. One was to do nothing, thereby permitting *Evans* to stand with its clear abrogation of all public immunity. The other way was to codify *Evans* in a manner similar to the New York model,[73] which provides for governmental liability as though the government were a private person, but which does not enumerate exceptions to this general waiver of immunity as in the case of the Federal Tort Claims Act.[74] Both of these approaches were rejected, most probably because they promised to bring financial havoc to all levels of government, and this fear outweighed the obvious equity of total abrogation.

The second form the Act might have taken would have mimicked statutes of Illinois[75] and California,[76] the former defining immunity for certain governmental bodies and liability for others, and the later cataloging every function of each governmental agency as a function either immune from or subject to liability. These formulations were also rejected, perhaps because they constituted mere codification of the dysfunctional governmental-nongovernmental distinction which so many state judiciaries and legislatures had long ago denounced.[77] Further, the Illinois and California models emphasized the prior inconsistencies of their *judiciaries'* governmental-nongovernmental distinction and sought to improve on this case law

[71] *Id.*

[72] Colorado Legislative Council, Governmental Liability in Colorado, Research Publication No. 134, Nov. 1968 [hereinafter cited as Legislative Council]. The council studied public liability, compiling a wealth of information about the experiences of other states which had abrogated immunity, as well as past problems specific to Colorado case and statutory law.

[73] N.Y. GEN. MUNIC. LAW §§ 50 to 51-a (McKinney 1965).

[74] 28 U.S.C. §§ 2680(a)-(k) (1954).

[75] ILL. ANN. STAT. ch. 85, §§ 1-100 to 10-101 (Smith-Hurd 1966).

[76] CAL. GOV'T CODE §§ 815, 815.2 (West 1969).

[77] *See* pp. 574-77 *supra.*

version, rather than to attack the primary injustice of the immunity doctrine itself.

The third option available to the general assembly was to overrule *Evans* and reinstate immunity in either its pre-*Evans* "judicial form" or in a new legislative form which would modify the troublesome governmental-nongovernmental and discretionary-ministerial tests. This latter alternative was ultimately selected by the Colorado legislature, and the Act, which is closely patterned after the statutes of Utah[78] and Michigan,[79] reaffirms immunity as the general rule and then provides for a number of exceptions.

B. *The Provisions of the Act*

Under the Act, general immunity extends to all forms of public entities including any "kind of district, agency, instrumentality, or political subdivision of the state organized pursuant to law."[80] The immunity doctrine continues in its historical shield of any public employee, "whether or not compensated, elected or appointed,"[81] and the common law "scope of employment" standard is codified by the Act, with independent contractors excluded from the class of protected individuals.[82]

The Act specifies that "[a] public entity shall be immune from liability in all claims for injury which are actionable in tort except as otherwise provided in this section."[83] The exceptions to such immunity specified in this section permit public liability under the following conditions:

> (b) The operation of a motor vehicle, owned or leased by such publice [*sic*] entity, by a public employee, while in the course of his employment, except emergency vehicles operating within the provisions of section 13-5-4 (2) and (3). C.R.S. 1963;
>
> (c) The operation of any public hospital, penitentiary, reformatory, or jail by such public entity, or a dangerous condition existing therein;
>
> (d) A dangerous condition of any public building;
>
> (e) A dangerous condition which interferes with the movement of traffic on the traveled portion and shoulders or curbs of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any paved highway which is a part of the federal secondary highway system, or of any paved highway which is a part of the state highway system, on that portion of such highway, road, street, or sidewalk which

78 UTAH CODE ANN. §§ 63-30-1 to -15 (1961).
79 MICH. STAT. ANN. §§ 3.996(101) to (115) (1967).
80 COLO. REV. STAT. ANN. § 130-11-3(2) (Supp. 1971).
81 *Id.* § 130-11-3(3).
82 *Id.*
83 *Id.* § 130-11-6(1)(a).

was designed and intended for public travel or parking thereon;

(f) A dangerous condition of any public facility, except roads and highways located in parks or recreation areas, public parking facilities, and public transportation facilities maintained by such public entity. Nothing in this paragraph (f) or in paragraph (e) of this subsection (1) shall be construed to prevent a public entity from asserting the defense of sovereign immunity to an injury caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area, or highway, road, or street right-of-way;

(g) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity, or a dangerous condition existing therein.[84]

In addition to these specific exceptions, a separate provision of the Act waives sovereign immunity to the policy limits of any liability insurance carried by the defendant-public entity.[85]

These exceptions would apparently create liability not only for harms which previously were not actionable, but also for those harms most commonly caused by employees of the state and its subdivisions. No doubt this was the benevolent intent of the general assembly. But when each exception is carefully scrutinized, read in terms of other provisions of the Act, and then compared to both *Evans* and the pre-*Evans* status of immunity, serious doubts as to the practical impact of the Act must be entertained.

C. *The Nonregressive Features of the Act*

Before turning to the central theme of this comment, the regressiveness of the Colorado Governmental Immunity Act, it is valuable to outline the nonregressive features of the Act.

For purposes of analysis, the waiver provisions may be divided into four groups: (1) waiver for injuries[86] arising from the negligent operation of motor vehicles, (2) waiver for injuries caused by the operation of certain public facilities, (3) waiver for injuries caused by the presence of a dangerous condition in such facilities, and (4) waiver by insurance. Each of these will be examined in turn.

1. Operation of a Motor Vehicle

The Act's first waiver of governmental immunity, that for injuries resulting from the operation of a motor vehicle by a public employee,[87] actually replaces prior statutory waiver for

[84] *Id.* §§ 130-11-6(1)(b) to -6(1)(g).

[85] *Id.* § 130-11-4.

[86] "Injury" is defined in the Act as "death, injury to a person, damage to or loss of property, of whatsoever kind, which would be actionable in tort if inflicted by a private person." *Id.* § 130-11-3(4).

[87] *Id.* § 130-11-6(1)(b).

injuries caused by the negligent operation of police, fire, and health department vehicles.[88] This new waiver covers a broader range of risk-producing activities and retains immunity only for certain emergency situations.[89] The waiver extends to all vehicles including those owned or leased by the public entity.

The only possible limitation of this waiver provision stems from the legislature's use of the common law phrase, "while in the course of employment," to qualify the government's waiver of immunity. But under the theories of "foreseeability" and "implied authority," Colorado courts have tended to construe "scope of employment" expansively, at least when such a construction favored the *immunity* of the public official.[90] If these precedents are retained, such a construction will now favor the *liability* of the public entity, and this first waiver provision should then operate to increase the number of successful suits brought by private plaintiffs.

2. Operation of Public Facilities

Subsection (c) and (g) of the specific waiver clause of the Act permit suits against the public entity for two distinct classes of activity. The first is for injury arising from the operation of public hospitals, penitentiaries, reformatories, or jails.[91] The second is for injury caused by the operation of any public water, gas, sanitation, electrical, power, or swimming facility.[92] The first group includes only facilities administered under a specific grant of sovereign power and thus previously *immune* as governmental activities under the common law test.[93] The second group includes only functions which were held proprietary at common law and thus subject to liability.[94]

At first glance this would appear to broaden the bases for public liability, but, as will be demonstrated below, these gains are questionable.

3. Dangerous Conditions

Potentially, the largest area of sovereign liability created

[88] *Id.* § 13-10-1 (1963).

[89] These emergency situations, liability therefor, dollar amount limits on recovery, and provision for insurance are treated by COLO. REV. STAT. ANN. §§ 130-10-1 to -3 (1963).

[90] The classic Colorado case on scope of employment is Comstock v. Bivens, 78 Colo. 107, 239 P. 869 (1925).

[91] COLO. REV. STAT. ANN. § 130-11-6(1)(c) (Supp. 1971).

[92] *Id.* § 130-11-6(1)(g).

[93] *See* Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960); City & County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960).

[94] *See* Cerise v. Fruitvale Water & Sanitation Dist., 153 Colo. 31, 384 P.2d 462 (1963); City of Longmont v. Swearingen, 81 Colo. 246, 254 P. 1000 (1927); City & County of Denver v. Maurer, 47 Colo. 209, 106 P. 875 (1910).

by the Act depends upon the existence of a "dangerous condition" in some public facility or on some roadway. Five of the six specific waiver provisions in the Act involve dangerous conditions, and the importance of clearly understanding this term cannot be overemphasized. Collapsing these five provisions the state and its subdivisions are liable for all injuries arising from the existence of a dangerous condition in any "public hospital, penitentiary, reformatory, jail,"[95] or any other "public building,"[96] or "any public facility (except roads and highways located in parks or recreation areas), public parking facilities and public transportation facilities."[97] The public entity is liable as well for any injury caused by the presence of a dangerous condition which interferes with the movement of traffic on the traveled portion and shoulders or curbs of any public highway, road, street, or sidewalk,[98] and for injury caused by a dangerous condition in any public water, gas, sanitation, electrical, power, or swimming facility.[99]

"Dangerous condition" is defined by the Act as existing "where the physical condition of public facilities or the use thereof constitutes a risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist . . . . A dangerous condition should have been known to exist if it is established that the condition had existed for such a period of time and was of such a nature that, in the exercise of due care, such condition and its dangerous character should have been discovered."[100] Moreover, the Act makes compulsory the proof of the time for which the condition has existed.[101] Therefore, although a plaintiff might establish, by other inferences, the existence of defendant's knowledge of the condition, the plaintiff may still be barred from recovery for want of adequate proof as to the time element.

Two other provisions may limit recovery under the Act for injuries arising from dangerous conditions. First, a dangerous condition must be evidenced by a *defective* condition which is somehow at variance from the intended condition of the premises. Thus, a defect in *design* alone will be insufficient as a

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[95] COLO. REV. STAT. ANN. § 130-11-6(1)(c) (Supp. 1971).
[96] *Id.* § 130-11-6(1)(d).
[97] *Id.* § 130-11-6(1)(f).
[98] *Id.* § 130-11-6(1)(e).
[99] *Id.* § 130-11-6(1)(g).
[100] *Id.* § 130-11-3(5)(a).
[101] *Id.*

grounds for waiver of immunity.[102] The second limitation excludes liability for injuries caused by the presence of a "dangerous condition on a public highway, road, street or sidewalk,"[103] or in a "public facility"[104] if such injury was caused by the "natural condition of any unimproved property."[105] This limitation operates irrespective of any knowledge, actual or constructive, which the defendant has of the dangerous condition.

Additionally, two ambiguities in the Act with respect to dangerous conditions promise to burden the courts. Both involve the applicability of the immunity waivers to suits arising from the existence of dangerous conditions on public roadways. First, when the Act was originally introduced, it called for the waiver of immunity wherever there existed "a dangerous condition on any highway, road or street."[106] As enacted, however, the statute applies only to "[a] dangerous condition which *interferes with the movement of traffic* on the traveled portion and shoulder and curbs of any public highway, road, street or sidewalk . . . ."[107] The ambiguity stems from the phrase "interferes with the movement of traffic." Must an element of the alleged tort be an interference with some legally recognized interest of the plaintiff which is *identical* to an "interference with the movement of traffic," or will any harm incident to the presence of a dangerous condition which *incidentally* interferes with traffic be a harm that is actionable? Only substantial litigation will determine to what extent this phrase will limit governmental liability.

The second ambiguity incident to the dangerous condition waivers involves injuries occurring on roads and highways within the exclusive control of counties. The legislative council in 1968 observed that counties were not liable for injuries caused by defective conditions on thoroughfares, but that cities were liable for such harm.[108] The council recommended that this discrepancy be corrected.[109] The general assembly "addressed" this problem by ignoring it. The only statutory classification relevant to highways retains immunity for unpaved

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[102] *Id.* § 130-11-3(5)(b).

[103] *Id.* § 130-11-6(1)(e).

[104] *Id.* § 130-11-6(1)(f).

[105] *Id.*

[106] H.R. No. 1047, 48th Gen. Assembly, 1st Sess. § 130-11-6(1)(e) (Colo. 1971).

[107] COLO. REV. STAT. ANN. § 130-11-6(1)(e) (Supp. 1971) (emphasis added).

[108] *See* Legislative Council at 137. *See also* City of Denver v. Williams, 12 Colo. 475, 21 P. 617 (1889).

[109] *See* Legislative Council at 137.

highways only. Immunity as to paved highways in cities is waived, but there is no mention of paved highways over which the county has control, ostensibly leaving the immunity of the counties intact.[110]

4. Waiver by Insurance

The final form of waiver designated by the Act depends upon the purchase of liability insurance by the public entity. Recognizing that insurance is an adequate answer to the fears that waiver of immunity will mean financial ruin to many governmental units, the legislature has provided for a general waiver of immunity as to all injuries caused by *any* activity, so long as the injury is one for which the insurance is applicable.[111] Damages under this provision are limited to the policy limits and are recoverable from the insurer only, although the insurer may not be named as a party defendant.[112]

This general waiver, however, is also limited. The operation of the waiver depends upon the purchase of insurance, and, although the state is required to insure itself for losses caused by conduct falling within any of the six specific waiver provisions in section 6 of the Act,[113] insurance for all other losses is merely permitted.[114] Moreover, at the time of this writing, no insurance, compulsory or voluntary, has been obtained by the state.[115] In short, this general waiver clause is little more than a safety feature of the Act, a feature which mandates the purchase of insurance to cover only those losses for which immunity has already been waived elsewhere in the Act.

5. Summary

These four general classes of waiver — for the operation of motor vehicles, for the operation of public facilities, for the presence of dangerous conditions, and for the purchase of insurance — are all admirable attempts by the general assembly to expand public liability. Some of the waivers are severely limited; others are free from any true limitation. Some are ambiguous, promising substantial problems for the courts; others are mere codifications of the common law, and the courts should be well acquainted with their sometimes clouded legal significance. But the greatest potential limitation on the effective-

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[110] This follows from the exclusivity of public liability as defined by the Act. COLO. REV. STAT. ANN. §§ 130-11-2, 130-11-6(1)(a) (Supp. 1971).

[111] *Id.* § 130-11-4(1).

[112] *Id.* § 130-11-4(2).

[113] *Id.* § 130-11-16.

[114] *Id.* § 130-11-15.

[115] *See* Denver Post, July 9, 1972, at 35, col. 4.

ness of the Act has not yet been discussed. This limitation embraces the several provisions of the Act which require the courts to retreat to the pre-*Evans* common law distinctions of governmental-nongovernmental and discretionary-ministerial functions.

D. *The Regressive Features of the Act*

The Act provides "that the distinction for liability purposes between governmental and proprietary functions should be abolished."[116] This, of course, is a policy wholly consistent with *Evans*. However, the realization of this policy under the new Act is a different matter altogether. The remainder of this analysis demonstrates the failure of the Act to achieve this statutory abolition.

1. Public "Operation" Versus Private "Operation"

As has already been mentioned, operation of certain public facilities and the presence of dangerous conditions in those facilities comprise the bulk of immunity waivers under the Act. The Act's specific definition of the term "operation" points to the first regression:

> "Operation" means the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions *vested in them by law* with respect to the purposes of any public hospital, jail, public water, gas, sanitation, power, or swimming facility.[117]

Recalling that absolute immunity is the rule and waiver the exception,[118] those waivers for the specified "operations" become effective in a rather curious manner. Where an injury occurs in the operation of any of the enumerated facilities, the court must decide if the act or omission is misfeasance or nonfeasance with respect to any duty or power vested in them by the *operation of law*. Since the phrase "vested in them by law" will include direct statutory grants of authority, this definition of "operation" has an ironic effect. Whereas, at common law prior to *Evans*, the public entity might be *immune* because the court had made out a governmental function from the existence of such a direct statutory grant of authority,[119] a similar finding under the Act will lead to *liability*. In any event, to decide whether the injury-producing activity complained of by a prospective plaintiff is part of an "operation," within the meaning of the statute, the courts must again determine the public vis-à-

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[116] COLO. REV. STAT. ANN. § 130-11-2 (Supp. 1971).
[117] *Id.* § 130-11-3(6)(a) (emphasis added).
[118] *See* p. 580 & note 83 *supra*.
[119] *See* p. 575 & note 48 *supra*.

vis private nature of the activity and the legal status of the power or duty under which the activity was performed. The governmental-nongovernmental distinction with which the courts have long expressed dissatisfaction, and which the general assembly in this very Act declares abolished,[120] has once again become the ultimate criterion for public liability.

2. Governmental "Operation" Versus Proprietary "Operations"

The legislative council's report, "Governmental Immunity in Colorado," made the following recommendation in 1968:

> The committee determined that the doctrine of immunity should not apply to those activities which are determined to be *proprietary* in nature and that the liability of an entity when engaged in these functions should be determined as if it were a private corporation or individual. These functions include but *are not limited to the following*: water, sewer, trash, and waste disposal, electric and gas utilities, swimming pools, etc.[121]

Thus the council intended that *all* functions defined previously at the common law as proprietary be subject to civil liability, yet the general assembly waived immunity only for those functions listed by the council as *examples* of proprietary functions, ignoring all other similar nongovernmental activities. This poses severe problems for the courts. Although they might now easily decide if a particular injury has been proximately caused by a specified nongovernmental function, what is the result if the injury-producing function is *not* enumerated in this waiver provision? If the court simply assumes, under proper canons of statutory construction,[122] that the list is exhaustive, or if it reads literally the clause, "the state and its political subdivisions . . . should be liable for their actions and those of their agents only to such an extent, and subject to such conditions, as are provided by this article,"[123] then the plaintiff's action must be denied, and the courts are forced back into the injustice of pre-*Evans* sovereign immunity. If the courts decline to read the list as exhaustive, they must then find some other criteria for judging whether immunity should or should not be applied. Without the guidance of the legislature in the matter of such criteria, and no such guidance is found in the Act, the courts must fall

120 COLO. REV. STAT. ANN. § 130-11-2 (Supp. 1971).

121 Legislative Council at 143 (emphasis added).

122 The canons of statutory construction require the court to treat all lists as exhaustive unless a contrary legislative intention is apparent (*expressio unius est exclusio alterius* — the expression of one excludes all others). *See* People v. One 1941 Ford 8 Stake Truck, 26 Cal. 2d 503, 159 P.2d 641 (1945).

123 COLO. REV. STAT. ANN. § 130-11-2 (Supp. 1971). *See also id.* § 130-11-6(1)(a).

back on something akin to the original governmental-nongovernmental distinction.

Whichever of these two approaches is taken, the basic confusion, uncertainty, and inequity of the sovereign immunity doctrine must continue. It is still quite possible that parents of a child killed because of negligent maintenance of a park will be barred from recovery, but parents of a child drowned in an adjacent swimming pool can recover to the limits set forth in the Act.[124]

3. Vicarious Immunity: The Final Regression

The clearly unfortunate feature of the Act, as described above, once again requires the courts to utilize some public-versus-private distinction in determining governmental liability for injuries arising from the operation of public facilities. But even the potential of these problems is dwarfed by the regressive effect of one other provision in the Act.

The list of specific waivers of immunity prescribed in section 6 of the Act is immediately followed by a proviso:

> Nothing in this section shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the *type of act* for which the public employee *would be or heretofore has been personally immune from liability.*[125]

Two constructions of this provision are possible. First, the courts may reason that the public employee has sometimes been personally immune from suit under the pre-*Evans* com-

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[124] Limitations on judgments. (1) (a) The maximum amount that may be recovered under this article shall be:

(b) For any injury to one person in any single occurrence, the sum of one hundred thousand dollars;

(c) For an injury to two or more persons in any single occurrence, the sum of three hundred thousand dollars; except that in such instance, no person may recover in excess of one hundred thousand dollars.

(2) Notwithstanding the provisions of subsection (1) of this section, if a public entity provides insurance coverage to insure itself against all or any part of its liability for any injury, or to insure a public employee acting within the scope of his employment against all or any part of his liability for injury, and the insurance coverage is in an amount in excess of the limits specified in subsection (1) of this section, then recovery may be had in an amount not to exceed the limitations of insurance coverage; except that for this purpose self-insurance as permitted in this article shall not be considered insurance coverage and shall not increase the limits of liability provided in subsection (1) of this section.

(3) Nothing in this section shall be construed to permit the recovery of damages for types of actions authorized under article 1 of chapter 41, C.R.S. 1963, in an amount in excess of amounts specifed in said article.

(4) A public entity shall not be liable for punitive or exemplary damages under this article.

Id. § 130-11-14 (Supp. 1971).

[125] *Id.* § 130-11-6(2) (Supp. 1971) (emphasis added).

mon law doctrine of sovereign immunity. If the agency of government for which he works is engaged in a generally "governmental" function or if he is personally employed in a "discretionary" activity at the time the injury occurs,[126] he will be immune from suit. In short, the public employee is personally immune because "heretofore" he has been immune under sovereign immunity. Since the employee is personally immune and since the state may avail itself of its employee's immunity, the state may vicariously assert *sovereign* immunity. This is clearly a circuitous construction as it goes directly to old sovereign immunity definitions to cloak the public entity with sovereign immunity even in those cases where immunity has now been expressly waived by the Act.

The second interpretation actually constitutes a potential "saving construction." Since the state's immunity depends upon its employee's immunity and since sovereign immunity in Colorado has a purportedly limited existence, the courts must now more clearly separate the doctrine of sovereign immunity from the doctrine of immunity for public employees.[127] Then some new test for deciding whether the public employee is personally immune must be devised independent of the pre-*Evans* sovereign immunity rules. The legislature, however, by using terms such as "heretofore . . . immune" has instructed the courts to look to common law in order to fashion such a test. Some criterion, either borrowed directly from common law or created from it, would then be necessary to adjudge the immunity of the employee. The *only* criterion available in this historical grab-bag is some public-private test such as the discretionary-ministerial distinction. But what does this mean? If, for example, the courts develop a standard which shields the public employee from suits in tort when his activity is "discretionary," then both the public entity and the official will escape liability strictly because he is involved in the *determination* and not the *implementation* of governmental policy.[128] The same criticisms leveled at such a distinction in the pre-*Evans* common law are again applicable. Any public-private dichotomy employed by the courts to interpret this vicarious immunity provision must rest on the traditional assumption that some functions of government are profoundly more sovereign than others.

[126] *See* p. 574 *supra*.

[127] This may be difficult to accomplish since the courts have treated the discretionary-ministerial test for public employee immunity as a subset of the governmental-nongovernmental test for public entity immunity. *See* p. 573 *supra*.

[128] *See* p. 573 *supra*.

As observed earlier, such criteria for public liability bear no rational relationship to the actual responsibility of the defendant, nor to the compensability of the plaintiff's injury.[129]

This vicarious immunity of the state impedes the operation of *all* specific waivers of immunity under the Act, for the vicarious immunity clause refers to all waivers listed in section 6 of the Act. Thus, in "abolishing" the governmental-nongovernmental distinction, the general assembly has merely transferred all the uncertainty and injustice of the pre-*Evans* common law to another public-private test, most probably the discretionary-ministerial distinction. In short, the pre-*Evans* quagmire has been altered in name only.

CONCLUSION

When one compares the Colorado Governmental Immunity Act to the historical common law doctrine of sovereign immunity, a number of common features are apparent. The same uncertainty and confusion which led to the decision in *Evans* has been restored to the law. The same injustices to which the law had become so acutely sensitive have been recreated. In the hands of an imaginative and aggressive bar, the doctrine of sovereign immunity in Colorado must again become a judicial nightmare.

In the past several decades, notions of social loss and "cost-spreading" have become favored concepts in the law of torts. Theoretically, the class of society which ultimately benefits from the risk-producing activity should bear the financial burden of compensating for any losses occasioned by the activity. These losses are also, in some sense, spread among that class which can best absorb them. For example, in a field such as products liability, it is the class of consumers which absorbs the loss suffered by individual members of the same class. The price of the product includes the cost of compensating for past and future losses. Moreover, such spreading is far more *efficient,* in the economists' sense of the word, than is leaving the loss to be absorbed by the injured individual as best he can.

In public liability the arguments are much the same. With the availability of insurance there is simply no justification for leaving the burden of loss upon the individual. Such loss is more efficiently spread through the class of citizens and taxpayers, each paying some minute fraction of total losses as part of the cost of government. The simple economic and social pressures which favor the spreading of loss, rather than letting

[129] *See* p. 576 *supra.*

it fall upon an individual incapable of effective "self-compensation," are pressures to which the supreme court in *Evans* was surely responding. The development of these pressures and the court's response to them suggest a higher sense of justice than that reflected by *any* continuation of governmental immunity. On this ground alone the Colorado Governmental Immunity Act must be condemned as a legislative regression.

Rodney R. Patula

COMMENT

WILLS — REVOCATION AND REVIVAL — NO REVIVAL OF PRIOR WILL BY REVOCATION OF SUBSEQUENT REVOKING WILL — *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

INTRODUCTION

THE distinctive attribute of a will which renders it unique from other legal instruments which affect property is its ambulatory quality. As a dispositive document, a will is not and cannot become operative until the demise of its maker. Derivative from this notion is the additional characteristic of revocability.[1] To be a will, it is imperative that the instrument be revocable.[2]

Revocation, as applied to wills, is "the recalling, annulling, voiding, or invalidating of a testamentary instrument which, but for such revocation, would have been given effect as a last will and testament."[3] Permissible modes of revocation are prescribed by statute in every state except Tennessee.[4] Typically, a will can be revoked: (1) nonintentionally, by operation of law when an event occurs (such as marriage of the testator) to which the law attaches the automatic effect of revocation or (2) intentionally, when the testator performs an act to the document (such as burning or tearing it) or when the testator executes a succeeding document (a new will, codicil, or other writing).[5] A subsequent written instrument can revoke an earlier one in two ways: expressly, by inclusion of a revocatory clause, or impliedly, by virtue of inconsistent provisions.[6]

Closely allied to the revocatory feature of wills is what might be termed its negative correlative, the phenomenon of revival. As wills may be executed and revoked, so too may

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1 "The essential element of revocability follows from the idea that the will is not meant to create any rights in others or to pass any interest in the property covered by the will prior to the maker's death." 1 BOWE-PARKER, PAGE ON WILLS § 1.2 (1960). "This revocable quality of the will is what is usually meant when it is said that the will is ambulatory." *Id.* § 5.17.

2 The power of a testator to revoke is of equal stature and importance as the power to make a will in the first place, and one of the inherent characteristics of a will is its revocability . . . . At modern law, . . . if it can be shown that the instrument in question is irrevocable, it is not a will whatever else it may be.
2 *Id.* § 21.1.

3 *Id.*

4 1 P-H WILLS, ESTATES AND TRUSTS SERV. ¶ 1007 (1969).

5 McKinlay, *Revocation of Wills*, 29 ROCKY MT. L. REV. 492 (1957).

6 2 BOWE-PARKER, *supra* note 1, § 21.33.

revoked wills be restored or revived, reassuming their temporarily interrupted legal efficacy. Revival is regulated by statute in only 31 states.[7] Among them and also among the states which have dealt with the issue solely by case law, many different approaches to the revival question abound. The conflict of authority associated with revival is nowhere more apparent than with respect to the question of whether the destruction of a later revoking will can bring about the revival of a once-revoked but still undestroyed earlier will.

Through an analysis of Colorado's leading case in this area, *Bailey v. Kennedy*,[8] this comment will examine this jurisdiction's position on revival by revocation of a revoking instrument and also explore the intimately related issue of revocation by subsequent will.[9] The following questions, as they pertain to Colorado, will be considered. If a testator executes a first will, later a second, and then destroys the second, when he dies is he testate according to the earlier will or intestate? Must the second will contain an express clause revoking all prior wills in order to effect a revocation under the statute?

I. *Bailey v. Kennedy*

Morrison Bailey died testate, naming his wife beneficiary of a testamentary trust and giving her a power of appointment over the trust qualified by a provision that if she were to die intestate, then the trust property was to be distributed to his heirs. Mrs. Bailey executed a will and codicil. She later executed a second will which contained a clause expressly revoking all prior wills. Subsequently, she revoked the later will by tearing and destroying it. At her death, proponents offered the first will and codicil for probate. Contestants (Morrison Bailey's heirs) produced a copy of the second will, proving its execution though not disputing the fact that it had been revoked by destruction. The trial court found that the later will had been revoked with the intention of reviving the earlier will and codicil and admitted these instruments to probate. The Colorado Supreme Court reversed, holding that the first will was revoked at the time the second was executed and that, once revoked, a will can be revived only by republication. The court remanded the case and ordered that the trust assets

[7] 1 P-H, *supra* note 4, ¶ 1008.

[8] 162 Colo. 135, 425 P.2d 304 (1967).

[9] The Colorado statute provides for revocation "by some other will or codicil in writing, or other writing declaring such revocation, executed, declared and attested as provided in section 153-5-2 [the statute defining the requisites of a will] . . . ." COLO. REV. STAT. ANN. § 153-5-3 (1963).

be distributed in keeping with Morrison Bailey's will and the remainder in accordance with the laws of intestacy.

II. Revival in Perspective

Revival has proved itself a most perplexing problem for the courts and legislatures of the last two centuries. Antecedent to and still coexistent with the *Bailey* holding is a motley assortment of precedent and statutes on the subject. To appreciate the *Bailey* position, therefore, one must view it against the backdrop of the rather protean past of the revival question.

England furnished the United States a rich legacy on the issue by formulating no less than three distinct positions with respect to whether the revocation of a subsequent will revives an earlier one.[10] At common law, revocation of a revoking will revives the latest undestroyed will automatically as a matter of law.[11] Resting upon the rule that a will is ambulatory, this theory asserts that a will which has been revoked prior to the testator's death can wield no power as a revoking instrument. The revocation of the second will constitutes a revocation of a revocation, leaving the earlier document unaffected.[12] A second case law rule, the ecclesiastical, considers revival a strictly factual question of the testator's intent at the time the second instrument was revoked.[13] The revocation takes immediate effect upon execution of the later will. Revival of the first instrument — at the later will's subsequent revocation — depends upon the available evidence regarding the testator's intentions concerning the earlier will with no presumption for or against revival. A third position was promulgated by Parlia-

[10] For interesting detailed accounts of the historical evolution of these various positions, see 2 Bowe-Parker, *supra* note 1, §§ 21.49 through 21.56; Evans, *Testamentary Revocation by Subsequent Instrument*, 22 Ky. L.J. 469 (1934); Roberts, *The Revival of a Prior by the Revocation of a Later Will*, 48 Am. Law Reg. 505 (1900); Zacharias & Maschinot, *Revocation and Revival of Wills*, 25 Chi.-Kent L. Rev. 185 (1947).

[11] Harwood v. Goodright, 1 Cowp. 87, 98 Eng. Rep. 981 (1774); Goodright v. Glazier, 4 Burr. 2512, 98 Eng. Rep. 317 (1770).

[12] A will has no operation, till the death of the testator. This second will never operated: it was only intentional. The testator changed his intention; and cancelled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable: and he has revoked it.

Goodright v. Glazier, 4 Burr. 2512, 2514, 98 Eng. Rep. 317, 319 (1770). As several commentators have pointed out, the use of the term "revival" in this context is technically incorrect. The revocation of the later will actually prevents the revocation of the former, and that which has never been revoked is hardly a candidate for "revival." *See, e.g.*, Roberts, *supra* note 10, at 517. One writer suggests that the word "restoration" would be more appropriate to the common law theory of revival. Evans, *Testamentary Revival*, 16 Ky. L.J. 47 n.1 (1927). Another contends that "It would be more logical for these courts to refer to the prior will as *suspended* by the subsequent will and *reinstated* by cancellation of that [second] will." 46 Colum. L. Rev. 496, 497 n.6 (1946).

[13] Usticke v. Bawden, 2 Add. 116, 162 Eng. Rep. 238 (1824).

ment via the Statute of Wills of 1837.[14] This "anti-revival" rule abrogated both the common law and the ecclesiastical rules and directed that, once revoked, a will could be revived only by re-execution or republication in compliance with the statute on the execution of wills. Although silent as to when a revocation by subsequent will took effect in time, the statute was soon interpreted to mean that the revocation occurred at the time of execution of the later instrument.[15] Under this "anti-revival" view, therefore, a will revoked by the execution of a later will can regain legal vitality only through re-execution or republication even when the second instrument itself meets rejection at the hands of the testator.

American jurisdictions, as a group, have historically favored no single English position on the revival question. Individual states have selected a preference from among the three rules, often adding variations.[16] In fact, no fewer than five views of the issue have been exhibited in this country:

> (1) the earlier will is revived ipso facto (common law rule); (2) the earlier will is revived unless an intention to the contrary appears (common law rule modified by the ecclesiastical rule); (3) the earlier will is not revived unless reexecuted or republished (English view after adoption of the Statute of Victoria [the Statute of Wills of 1837]); (4) the earlier will is not revived unless intent to revive appears (post-Statute of Victoria view modified by the ecclesiastical rule); (5) revival is solely a question of intent (ecclesiastical rule).[17]

One writer suggests, however, that these five positions are now only of historical interest because, by case law and statute,

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[14] 7 Will. 4 & 1 Vict., c. 26, § 22 (1837).

[15] Major v. Williams, 3 Curt. 432, 163 Eng. Rep. 781 (1843) (by implication). Prior to this case, it was arguable that the Statute of Victoria did not interfere with the common law rule because it pertained only to "revoked wills," and according to the common law view, the first will is never revoked following revocation of a subsequent will prior to the testator's death. Unrevoked wills merely continue in existence and need not be republished. However, in holding that the revocation took immediate effect upon execution of a subsequent will, the English courts effectively rejected that argument.

[16] [T]he question of revival of an earlier will by the destruction or other revocation of a later will is involved in much contradiction and conflict. The courts of different jurisdictions seem to have taken every conceivable view of the matter . . . .

Roberts, *supra* note 10, at 506. Almost 50 years later, the situation had evinced no discernible improvement:

> This survey of judicial decisions dealing with revocation and revival of wills, even when taken state by state, discloses an almost kaleidoscopic pattern of confusing factual situations and legal determinations from which one could draw a parallel case to fit almost every set of circumstances which human ingenuity or carelessness could produce or to bolster up an argument on either side of some particular problem.

Zacharias & Maschinot, *Revocation and Revival of Wills*, 26 CHI.-KENT L. REV. 107, 146 (1948).

[17] 63 W. VA. L. REV. 86, 88 (1960) (citation omitted). *See generally* Annot., 28 A.L.R. 911 (1924); Annot., 162 A.L.R. 1072 (1946).

the jurisdictions adhering to the ecclesiastical rule or one of its variants (rules 2, 4, and 5) have settled upon a functionally similar view, denominated the "American Rule," which holds that a prior will is not revived unless it is clear that the testator intended revival.[18] Given this consolidation, we find that in the United States today, 29 states follow the hybrid "American Rule";[19] six have remained faithful to the English common law rule;[20] and 12 have adopted an "anti-revival" rule modelled after the English Statute of Wills.[21] Prior to the *Bailey* case, Colorado was among the three states which espoused no view with respect to revival.[22]

The English experience and the disparity of opinion relative to the revival question still evident among American jurisdictions reflect the thorny nature of the issue. In seeking a solution to the problem of how to treat a former will when a later one is destroyed, the courts and legislatures are faced with a dilemma. Two conflicting goals, both of which are fundamentally intrinsic to the law of wills, must be reconciled. The testator's evinced intent must be honored with the utmost fidelity, while at the same time, statutory safeguards associated with the execution and revocation of wills must be deferred to in the spirit of the Statute of Frauds[23] as expressed in American statutes. In other words, the strict exclusionary rules regulating the admissibility of parol evidence in determining a testator's intent must be heeded while simultaneously attempting to maximize opportunity to arrive at a true finding of that intent as manifested by him. How the various positions on revival deal with this tension will be consider following an examination of the court's reasoning in the instant case.

III. The *Bailey* Rationale

Bailey was a case of first impression in Colorado. Having no revival statute upon which to base its decision, the Colorado Supreme Court was faced with the competing positions extant on the issue. In reaching its decision, the court alluded to the

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[18] Comment, *Revival of Revoked Wills*, 19 Wyo. L.J. 223, 228 (1965).

[19] "American Rule:" 19 states by statute (Ala., Alas., Cal., Idaho, Ind., Kan., Mo., Mont., Nev., N.M., N.Y., N.D., Ohio, Okla., Ore., Pa., S.D., Utah & Wash.) and 10 states by case law (Iowa, Md., Mass., Minn., Neb., N.H., N.J., Tenn., Vt. & Wyo.). *Id.* at 229 nn.32-36.

[20] Common law rule: two states by statute (La. & Mich.) and four states by case law (Conn., Del., R.I. & S.C.). *Id.* at 229-30 nn.37-39.

[21] "Anti-revival" rule: 10 states by statute (Ark., Fla., Ga., Hawaii, Ill., Ky., N.C., Tex., Va. & W. Va.) and two states by case law (Miss. & Wis.). *Id.* at 230 nn.40-43.

[22] Arizona and Maine, in addition to Colorado, have no position on revival. *Id.* at 230.

[23] 29 Car. 2, c. 3, § 22 (1677).

"notable division of authority"[24] on the question of revival by revocation of revoking will but apparently felt that delineation of the relative merits of the several views was unwarranted. The court proceeded directly to its own choice, giving the impression that it believed that the statute on revocation compelled only one result.[25]

The Colorado statute on revocation of wills provides for several modes to revoke a will:

> A will shall be revoked by, and only by, the subsequent marriage of the testator, or by burning, tearing or obliterating the will by the testator himself, or in his presence and by his direction and consent, or by some other will or codicil in writing, or other writing, declaring such revocation, executed, declared and attested as provided in section 153-5-2 [the statute defining the requisites of a will] . . . .[26]

By the plain words of the statute ("by, and only by") and by case law,[27] these are the mandatory and exclusive methods by which to effect a revocation. Relying on local precedent,[28] the *Bailey* court declared that all methods of revocation listed in the statute are of equal effectiveness when accomplished coincidental with the necessary intent to revoke. All methods being equal, any of the statutory modes of revocation must therefore become operant at precisely the same point in time. Obviously, when a will is revoked by an act to the document itself (burning, tearing, or obliterating), such revocation has immediate physical and legal effect: in whole or in part, the instrument is literally destroyed. To hold that revocation by subsequent will does not take effect until the instrument is admitted to probate, the court reasoned, would yield inequality among the modes by giving "undue prominence and unwarranted preference" to revocation by act to the document and thus favor the abusive revocatory forms over revocation by subsequent instrument.[29] Furthermore, since there is nothing on the face of the statute to indicate that the modes are to vary with respect to the time of their operative effect, the court concluded that the legislature intended each method of revocation

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[24] Bailey v. Kennedy, 162 Colo. 135, 137, 425 P.2d 304, 305 (1967).

[25] Other courts in jurisdictions with a revocation statute like Colorado's have reached contrary results. *See, e.g.*, Timberlake v. State-Planters Bank of Commerce & Trusts, 201 Va. 950, 115 S.E.2d 39 (1961), *noted in* 10 KAN. L. REV. 106 (1961); 18 WASH. & LEE L. REV. 166 (1961); 63 W. VA. L. REV. 86 (1960).

[26] COLO. REV. STAT. ANN. § 153-5-3 (1963).

[27] Isenbart v. Johnson, 124 Colo. 436, 238 P.2d 879 (1951).

[28] Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1923); Freeman v. Hart, 61 Colo. 455, 158 P. 305 (1916).

[29] 162 Colo. at 139, 425 P.2d at 306.

to be the equal of the others.[30] Revocation by any statutory method has present effect at the exact moment it is employed.

By its result, the court held that the execution of a subsequent will containing a revocatory clause constitutes a statutory mode of revocation. This holding was clearly within the meaning of the plain words of the statute. A will can be revoked by "some other will," and even if that will must "declare" such revocation (discussed *infra*), certainly a will having a clause revoking all previous wills can be said to "declare" a revocation. Since all modes of revocation are equivalent and therefore accomplish a revocation at the same instant, the execution of a second will with a revocatory clause, as a recognized mode of revocation, is tantamount to physical destruction of the earlier document.

The trial court had embraced the "American Rule" of revival in holding that Mrs. Bailey died testate by her earlier will and codicil because she had revoked the later will with the intention of reviving the first. The supreme court rejected this view and adopted the "anti-revival" rule, holding that once revoked, a will can be revived only by republication of the document in compliance with the statute which prescribes the requisites of a will. In reversing the lower court, the supreme court called attention to the danger which inheres in the "American Rule," and clearly intimated in dictum that a doctrine which allows a once-revoked will to regain legal sanction through parol evidence hazards the twin perils of fraud and perjury for the reason that, as here, oral evidence as to intent will frequently be provided by claimants who stand to gain or lose by the result.[31] If a Colorado testator intends an earlier instrument to be revived upon the destruction of a later one having a revocatory clause, he must manifest that intent with nothing less than the statutory formalities required to create it in the first instance. Tolerating less stringent standards regarding manifestation of testamentary intent, the court seems to say, compromises the statutory safeguards developed to protect the testation process and invites their breach. In Colorado, only through republication can a revoked will be revived.

IV. Revival in Colorado

The position on revival settled upon by the *Bailey* court derives from abundant authority, conforming with the doctrines of England and 12 other states in this country.[32] Inasmuch as

[30] *Id.* at 138-39, 425 P.2d at 306.
[31] *Id.* at 140, 425 P.2d at 306-07.
[32] List of states note 21 *supra.*

two other views of the matter also have currency in the United States, a juxtaposition of *Bailey* with them affords a means to evaluate the implications of the Colorado decision. The degree to which each view maintains the competing objectives of faithfulness to the testator's intent and avoidance of the parol evidence dangers in the probate process is a proper benchmark by which to gauge their relative merits.[33]

The common law rule, accepted in a distinct minority of states, has elicited much criticism. A classic and cogent repudiation of that rule was expressed in an early Georgia decision concerned with revival by revocation of a later inconsistent will:

> The case is this: He had a scheme, and abandoned it for another, and thus [then?] abandoned the second. . . . [C]an you . . . say that when he abandons the last he returned to the first? If these two schemes comprehended *all the possible dispositions* of his property, then the conclusion would be a logical one . . . . But when the number of possible schemes in every case is legion, you cannot say that because he has departed from any one you know his mind has settled upon any other particular one out of that infinite number. The whole fallacy lies in assuming that the two papers *exhaust* the subject. It seems to me that the abandonment of any one scheme does not of itself afford the least *indication* in favor of any other particular one out of an infinite number.[34]

As this case implies, the common law rule ignores the possibility that the testator intended to die intestate when he revoked the later instrument. With this in mind, one authority submits that the "anti-revival" rule conforms more closely to the effect most testators would expect a later revoking will to have on an earlier one: that a prior will is revoked finally and forever at the time a second is executed.[35] The prevention of automatic revival protects against probation of a previous will which had at one time been rejected by the testator but retained inadvertently or for records-keeping purposes with the belief that it was devoid of present or potential legal efficacy.

Another criticism of the common law rule is that it fails to distinguish between the dispositive and revocatory functions

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[33] Professor Page has stated that a truly ideal rule in this area is unachievable: "No rule can be worked out which will avoid the dangers of oral evidence on the one hand and which will give effect to the actual intention of the testator in the particular case, on the other." 2 BOWE-PARKER, *supra* note 1, § 21.54. It follows that some compromise between the two objectives is inevitable. No rule is completely free from criticism; therefore, whichever a court chooses as the "best" rule is so in only a relative, not ideal, sense.

[34] Harwell v. Lively, 30 Ga. 315, 320-21, 76 Am. Dec. 649, 651 (1860) (emphasis added by the Georgia Supreme Court).

[35] 2 BOWE-PARKER, *supra* note 1, § 21.54.

of a will. Although it is undisputed that the dispositive provisions of a will must be considered ambulatory, this argument contends that revocatory provisions must be given immediate effect at the time a subsequent will is executed in that a revocatory clause is not essential to testamentary validity and should be considered a separate instrument of immediate effect.[36] The same reasoning has also been applied to inconsistency in the subsequent will on the ground that there is no difference in principle between revocation by express clause and by implication.[37]

Although the ecclesiastical rule and its modern variant, the "American Rule," attempt to avoid distortion of the testator's intent risked by automatically probating a will about which only one thing is known for certain — that it was in some degree expressly or impliedly rejected by the testator — it indulges a greater hazard: the danger of abuse of the entire probate process by allowing oral testimony from interested parties.[38] This approach is contrary to the spirit of the Statute of Frauds in permitting a will once revoked to be restored to legal consequence on the basis of parol evidence alone.[39]

The *Bailey* view on revival avoids the dangers of parol in determining the validity of a prior will and, in the opinion of this writer, runs a minimal risk of abusing the testator's intent.[40] When a testator executes a subsequent will it is reasonably safe to assume that in some respect the second instrument revokes the first. For what other reason would a person execute a second testamentary document if not to change one

[36] Note, *Destruction of a Subsequent Will as Effecting the Revival of a Prior Will*, 5 TEMPLE L.Q. 614, 622 (1931); 12 COLUM. L. REV. 353, 355 (1912).

[37] 46 COLUM. L. REV. 496, 498 n.9 (1946). *See generally* Note, *Revival by Revocation of a Later Instrument — Effect of a Revocatory Clause*, 28 KY. L.J. 227 (1940).

[38] The courts which have adopted the ecclesiastical law rule . . . attempt to do justice by giving effect to the actual intention of the testator; but they do it by throwing open the gates for oral evidence of testator's declarations, upon which the validity of the first will is to depend.

2 BOWE-PARKER, *supra* note 1, § 21.54. With respect to American statutes which direct that there is no revival unless it appears by the terms of the revocation, one authority states that the "prevailing" interpretation of such statutes is that the phrase, "unless it appears by the terms of the revocation," applies only to instances of written revocation and that oral assertions as to intent are not sufficient to revive under a statute of this type. To the extent that this is true, then no objection can be made that this position violates the Statute of Frauds. Ferrier, *Revival of a Revoked Will*, 28 CAL. L. REV. 265, 266 n.7 (1940).

[39] *See* the report of the committee on revision of New York statutes (dated 1827-28) as quoted in Ferrier, *supra* note 38, at 267; 12 COLUM. L. REV. 353, 355 (1912).

[40] *But see* Ferrier, *supra* note 38, at 272-75.

already in existence?[41] Inconsistency or a revocatory clause in the second will manifests a disclaimer of the first. In tearing up the second, the rejection itself is rejected, but the conclusion that by such act the testator automatically intends testacy by revival of the first is only one of many possible intentions. Further, if the testator desires that the first will be reinstated, he can do so through republication and thus express his desires unequivocally and preclude the necessity of establishing his intent through parol evidence.

Intestacy, established by statute and representing the legislature's accumulated judgment on how the average deceased person would probably have wished his assets distributed had he made a will, requires no safeguards.[42] Since the first English Statute of Wills,[43] the testation process has been closely regulated and guarded through comprehensive statutory controls.[44] Despite the possibility for denial of a testator's wishes inherent in the "anti-revival" rule, is it not better to risk distribution of a testator's property according to the laws of intestacy rather than to risk an even greater abuse of the estate by allowing oral evidence to determine distribution when a testator destroys a second will, leaving a once-revoked will in existence?[45] The *Bailey* view refuses to honor any manifestation of a testator's intent other than those required by statute to create a will in the first place. To make a will, certain formalities must be met. To "re-make" a will, the same should hold true.

V. REVOCATION BY SUBSEQUENT WILL IN COLORADO

Since the second will in the *Bailey* case contained an express clause revoking all prior wills, the court did not reach the question of what result would ensue if the later will had no revocatory clause.[46] This comment will conclude with a con-

[41] It is possible, though extremely improbable, that the second will duplicates the first because, for example, the testator forgot that he had already executed a will previously or he believed that a change in circumstances (such as the birth of a child or a change of residence) required a new testamentary act. However, such possibilities are so remote that it is more reasonable to assume that the second instrument did alter the first in some respect. This assumption relates only to the desirability of the "anti-revival" rule as compared to the other two rules, and it is not suggested that it be accorded the status of a legal presumption.

[42] "[T]he law views intestacy as normal and requires no safeguards, whereas experience has shown the necessity of safeguards around testamentary acts." 32 YALE L.J. 396, 398 (1923).

[43] 32 Hen. 8, c. 1 (1540).

[44] *See generally* Rees, *American Wills Statutes* (pts. 1-2), 46 VA. L. REV. 613, 856 (1960).

[45] Ferrier, *supra* note 38, at 267; 32 YALE L.J. 396 (1923).

[46] One would expect this issue to arise far less frequently than the question of how to treat the effect of the destruction of a second will with a revocatory clause because the great bulk of wills are drawn (at least

sideration of this issue and attempt to answer the question posed in the introduction: does the execution of a second will absent a revocatory cause constitute a statutory revocation?

Some American jurisdictions distinguish between the effects of subsequent wills which have and those which do not have a revocatory clause.[47] If the second will does contain a clause, then the revocatory effect is deemed immediate and final at the execution of the document. The theory underlying this doctrine is that an express clause of revocation should be regarded independent from the instrument and hence a statutory revocation at once.[48] On the other hand, if the second will is merely inconsistent, then the revoking effect is considered ambulatory and thus cannot operate unless admitted to probate. This distinction has received a mixed reaction from legal writers,[49] and the majority of jurisdictions advancing the "anti-revival" theory are said to make no distinction, holding that no revival of an earlier will can be brought about by the destruction of a later revoking will, regardless of the presence or absence of a revocatory clause.[50]

The Colorado statute on revocation of wills provides for revocation "by some other will or codicil in writing, or other writing, *declaring such revocation,* executed, declared and attested as provided" by the statute on the execution of wills.[51] A literal interpretation of the italicized phrase, "declaring such revocation," would dictate the use of an express revocatory clause. Does the phrase apply only to "other writing," and not to "some other will," thus allowing revocation by the mere execution of a second will without a revocation clause? Or does the qualification apply to all three listed instruments alike and thus seem to require that a second will must have an express clause of revocation in order to have revocatory effect? For at least two reasons, the phrase must be said to apply to all three. First, the phrase is set off by commas as a participial phrase in apposition, and as such, it modifies all three nouns preceding it. A second and more significant indicator may be

those drafted by lawyers) according to a fairly routinized pattern and include a revocatory clause in the preamble as a matter of course. 7 BOWE-PARKER, *supra* note 1, at 7; 5 TEMPLE L.Q. 614 (1931).

[47] *See, e.g.*, Cheever v. North, 106 Mich. 390, 64 N.W. 455, 37 L.R.A. 561, 58 Am. St. R. 499 (1895); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 92 (2d ed. 1953); 2 BOWE-PARKER, *supra* note 1, § 21.54; 28 KY. L.J. 227 (1940).

[48] T. ATKINSON, *supra* note 47, § 92; 5 TEMPLE L.Q. 614 (1931).

[49] *See, e.g.*, Roberts, *supra* note 10, at 520 (approving) and 15 HARV. L. REV. 142 (1901) (disapproving).

[50] T. ATKINSON, *supra* note 47, § 92.

[51] COLO. REV. STAT. ANN. § 153-5-3 (1963) (emphasis added).

gleaned from legislative history. Prior to 1947, the statute read as follows: a will shall be revoked "by some other will or codicil in writing, declaring the same."[52] In 1947, the state legislature amended the statute to include revocation by an "other writing," adding it followed by a comma.[53] In view of the fact that "declaring the same" (the precursor to the more explicit present phrase, "declaring such revocation") applied to "will" and "codicil" originally in the statute, it is reasonable to conclude that it still so applies today.

In light of the fact that the subsequent instrument, whether it be a will, a codicil, or an other writing, must "declare" a revocation in order to meet the requirement of the statute, a literal reading of the statute would seem to indicate that a subsequent will must have a revocatory clause to accomplish the nullification of a previous will. Whether a clause is actually necessary will depend upon the meaning the courts are willing to impute to the phrase "declaring such revocation."

The Colorado Court of Appeals, in *In re McKeown*,[54] recently construed this section of the statute, and the opinion suggests that Colorado courts will not favor a strict literal reading of it (that the phrase demands the use of an express clause of revocation). A testatrix executed a codicil modifying the first article of her will. Later, she executed a second codicil inconsistent with the first but which did not contain a revocatory clause, although it did acknowledge the earlier codicil by general reference to it. Both were admitted to probate, and counsel argued that the second codicil could not revoke the first because it was merely inconsistent with the first and did not expressly "declare" a revocation of it as directed by the statute. In rejecting this argument, the court held that to effect a revocation under the statute, the word "revoke" or any form of it is not obligatory. It was enough that the express wording of the second codicil was inconsistent with the earlier one. In effect, the court concluded that inconsistency is a sufficient "declaration" of revocation to fulfill the requisite of the statute.[55]

An additional reason to suggest that Colorado courts may consider the execution of a second inconsistent will absent a

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[52] COLO. REV. STAT. ANN., C. 176, § 40 (1935).

[53] Ch. 341, § 1, [1947] Colo. Sess. Laws 935.

[54] 28 Colo. App. 49, 470 P.2d 611 (1970).

[55] *McKeown* is not precisely on point since it dealt with two codicils, both of which were in existence at the time of probate. However, in the appeals court's willingness to construe the phrase "declaring such revocation" more broadly than a strict literal reading would allow, the case suggests a direction which might lead to a holding that inconsistency is sufficient to "declare a revocation" within the meaning of the statute.

revocatory clause a revocation under the statute is implicit in the fact that Colorado, as do all American states,[56] accedes in the doctrine of revocation by implication.[57] Since the revocation statute is mandatory and sets forth the exclusive methods by which a will can be annulled, one must conclude that either the courts have acquiesced in allowing this doctrine to operate contrary to the dictates of the statute or else the statute is amenable to a construction which permits this type of revocation. In view of the superiority of constitutionally valid legislative fiat over the common law, the latter must be the case.

More compelling support of the idea that the statute can be construed to allow revocation by implication derives from Illinois precedent. This issue was faced squarely by the supreme court of that state on more than one occasion, and in view of the fact that the Colorado statutory enactments on wills were borrowed from that state,[58] the Illinois decisions are very persuasive on this point.[59] The Illinois statute on revocation provided for revocation "by some other will, testament or codicil in writing declaring the same . . . ."[60] This provision was interpreted by the court, in two cases,[61] to mean that there could be no revocation by implication in Illinois because to revoke a previous will, a subsequent will must contain an express revocatory clause. In a third decision, *Lasier v. Wright*,[62] the Illinois Supreme Court declared that it had erred in its intrepretation of the statute expressed in the earlier cases and held that the statutory language could and did provide for revocation by implication, reasoning as follows:

> When a testator makes a will absolutely inconsistent with all other wills and declares it his last will and testament, such acts of necessity amount to a declaration that all former wills are revoked. The word "declare," as defined by the lexicographers, means primarily to make known; to make manifest; to make clear; to present in such a manner as to exemplify; to disclose;

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[56] 2 BOWE-PARKER, *supra* note 1, § 21.1. *See generally* Annot., 51 A.L.R. 652 (1927); Annot., 59 A.L.R.2d 11 (1958).

[57] Estate of Lehmer, 144 Colo. 477, 357 P.2d 89 (1960); Whitney v. Hannington, 36 Colo. 407, 85 P. 84 (1906).

[58] Keeler v. Trueman, 15 Colo. 143, 25 P. 311 (1890).

[59] Colorado is known to have adopted into its realm of statutory law provisions from the Illinois statutes, and consequently when the occasion arises, our court frequently gives prime consideration to Illinois precedent when necessary to interpret such a statutory provision.
Vandermee v. District Ct., 164 Colo. 117, 121, 433 P.2d 335, 337 (1967).

[60] Ch. 148, § 17, [1871-72] Ill. Laws 775.

[61] Limbach v. Limbach, 290 Ill. 94, 124 N.E. 859 (1919); Stetson v. Stetson, 200 Ill. 601, 66 N.E. 262 (1903) (dictum).

[62] 304 Ill. 130, 136 N.E. 545 (1922).

> to reveal. The testator in this case, *within the meaning of the statute, has declared a revocation* of his former will by *impliedly* saying in every clause thereof that the will he was then executing was his will and his complete and only will. *It was not necessary to use express words in terms declaring such revocation.* The statute makes no such requirement.[63]

Revocation by implication realized through inconsistent testamentary provisions is, therefore, a "declaration of revocation" within the meaning of the statute.

Intent is a purely subjective phenomenon of which the law can take cognizance only as it is objectively manifested through overt behavior. Certainly, a revocatory clause is an unambiguous expression of intent to revoke prior instruments. In recognizing revocation by implication, courts also treat inconsistency as a reliable objective manifestation of intent to revoke. Therefore, under the *Bailey* "anti-revival" rule, if it can be shown that a testator executed a later will inconsistent with an earlier one and then destroyed the second leaving the first, the testator will be deemed intestate to the extent the inconsistency can be established. There is, in fact, authority for precisely this result in England.[64]

What might be the result when a will is being offered to probate and it is shown to the court that the testator had executed a subsequent will but no evidence as to the contents of the second instrument is available? In other words, is the mere execution of a second will, without more, a revocation under the statute? Probably not. Absent any evidence as to the contents of a lost or destroyed will, the courts will not presume that the provisions of it were inconsistent with the first.[65] Therefore, with neither a revocatory clause nor inconsistency shown, the later will cannot be said to have "declared a revocation" as required by the statute. Hence the mere execution of a later will, without more, is not a revocation, leaving prior

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[63] *Id.* at 136, 136 N.E. at 552 (emphasis added).

[64] In the Goods of Hodgkinson, [1893] P. 339. Testator made a first will giving all his property to one person and appointing her sole executrix. He then executed a second will, without expressly revoking the first, devising his real property to another person and appointing that person sole executrix. Subsequently, he cancelled the later instrument. The court held that the first will had been partially revoked and granted probate only to such part of the testator's assets as was not comprised in the second will and declared intestacy as to the rest. "If the whole of the first will had been revoked by the second will, it would not have been revived by the cancellation of the second will; and the same principle applies to the revocation of part of the first will." *Id.* at 340.

[65] *In re* Wolfe's Will, 185 N.C. 563, 117 S.E. 804 (1923) (there is no presumption that a later will is inconsistent with an earlier one).

documents unaffected and still viable.[66] Thus the testator would be considered testate according to the terms of the latest undestroyed will.[67]

CONCLUSION

The *Bailey* decision stands in lieu of a statutory revival statement in Colorado, obviating the need for one in holding that once a will is revoked by a means provided in the statute on revocation, it cannot be resurrected except through republication. This holding corresponds to the wisdom of the English Parliament in the Statute of Wills of 1837 (which continues to govern in that country today), and it also agrees with the position taken by at least 12 other jurisdictions in the United States. More importantly, it is harmonious with the probable intent of most testators and steadfastly avoids the dangers of parol evidence in the spirit of the Statute of Frauds.

Bailey also adds substance to the revocation statute in declaring that the execution of a later will with a revocatory clause constitutes an immediate and complete revocation of all prior wills. The revocatory effect of a second will lacking a clause still awaits resolution. However, the refusal of the Colorado Court of Appeals to impose a technical and literal meaning upon the words of the revocation statute,[68] coupled with the notion that the statute may be interpreted to permit revocation by implication (or, more specifically, inconsistency is a "declaration" of revocation), tend to indicate that a will without a revocatory clause might well be considered a statutory revocation of prior wills to the extent that inconsistency between them can be established.

Thomas L. Roberts

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[66] Eder v. Methodist Ass'n, 94 Colo. 173, 29 P.2d 631 (1934) (a will not shown to have been revoked in accordance with the statute on revocation must be held to be in existence).

[67] *See* Annotations at note 56 *supra* listing American cases holding that the mere execution of a second will does not constitute a revocation.

[68] *In re* McKeown, 28 Colo. App. 49, 470 P.2d 611 (1970).

COMMENT

FEDERAL JURISDICTION AND FEDERAL COMMON LAW — ENVIRONMENTAL LAW — Public Nuisance Suits Concerning Interstate Water Pollution — *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)

INTRODUCTION

IN a recent environmental suit the State of Illinois filed a motion for leave to file a bill of complaint under the original jurisdiction of the Supreme Court against four cities in Wisconsin, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. The plaintiff requested that the Court abate the public nuisance being caused by the defendants' daily discharge of over 200,000,000 gallons of raw or inadequately treated sewage into Lake Michigan in and near the Milwaukee area. The Court's decision, written by Mr. Justice Douglas, denied the motion and remitted the parties to the appropriate federal district court for resolution of the controversy.[1] While declining to exercise its original jurisdiction, the Court held that the appropriate forum for the adjudication of the dispute was a federal district court. The Court further reasoned that since the issue of a state-created public nuisance affecting another state is a federal question[2] and that, in the absence of a specific substantive statutory remedy,[3] the federal question should be resolved by applying the federal common law of nuisance.[4]

The significance of the decision lies in the Court's jurisdictional mandate and in its acknowledgement of the validity of federal common law in the adjudication of an interstate water pollution issue. The purpose of this comment is to examine the question of jurisdiction and to show how and why federal common law was held applicable to the resolution of this issue in *Illinois v. City of Milwaukee.*

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[1] Illinois v. City of Milwaukee, 406 U.S. 91, 108 (1972).

[2] *Id.* at 98-101.

[3] The Federal Water Pollution Control Act, 33 U.S.C. §§ 1151, 1160 (1970), does not create the specific remedy for the abatement of interstate water pollution; The Rivers and Harbors Act of March 3, 1899, 33 U.S.C. §§ 401, 407 (1970), specifically exempts sewage from its control. *See also* Note, *A Comparison of Texas v. Pankey and Ohio v. Wyandotte Chemicals Corp. Reveals the Necessity for a Federal Common Law Right to Abate Interstate Pollution*, 50 TEXAS L. REV. 183, 191 (1970) for a discussion on the problems of existing remedies.

[4] 406 U.S. at 107.

I. JURISDICTION

A. *Original Jurisdiction*

The Supreme Court is granted original jurisdiction in a suit between a state and citizens of another state by the Constitution[5] and federal statute.[6] Although original and exclusive jurisdiction is applicable in a controversy between two states,[7] the Court has been reluctant to invoke its original jurisdiction in cases which are not "appropriate."[8] The "appropriateness" of a case for Supreme Court consideration is determined by the dual test of unavailability of an alternate forum to decide the case and inability of that forum to fashion adequate relief.[9]

When a state brings an action against citizens of another state, as in the *Illinois* case,[10] another forum is made available by virtue of federal statute. Although this statute implies that the federal district court is the appropriate forum,[11] court decisions have split on the issue. In a recent pollution case similar to the *Illinois* case, *Ohio v. Wyandotte Chemicals Corp.*,[12] the state supreme court was deemed the appropriate forum. In contrast to this holding, a 1907 Supreme Court case concerning interstate air pollution, *Georgia v. Tennessee Copper Co.*,[13] granted original jurisdiction in a suit by a state against citizens of another state.

That it is unlikely the Supreme Court will exercise its original jurisdiction in such cases appears to have been firmly established by *Wyandotte*. The *Georgia* case was decided over 60 years ago, and its usage with regard to the jurisdiction issue since that time is nonexistent. When the issue was finally confronted in *Wyandotte*, the Court adamantly held that it was not the appropriate forum for these cases. The Court

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[5] U.S. CONST. art. III, § 2.

[6] 28 U.S.C. § 1251(b)(3) (1970).

[7] *Id.* § 1251(a)(1). *See, e.g.*, New Jersey v. New York, 345 U.S. 369 (1963); Missouri v. Illinois, 200 U.S. 496 (1906).

[8] Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

[9] *Id.*

[10] 406 U.S. at 97. Political subdivisions, such as the defendants in *Illinois*, are considered citizens of the state.

[11] 28 U.S.C. § 1251(b)(3) (1970). *See* Ames v. Kansas, 111 U.S. 449, 469 (1884), in which the Court held that "we are unable to say that it is not within the power of Congress to grant to inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." The Court removed this suit to the federal district court.

[12] 401 U.S. 493 (1971). *See* Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case*, 12 ARIZ. L. REV. 691 (1970) for a discussion on the jurisdictional choice between federal and state courts in connection with this decision and its impact on interstate pollution cases.

[13] 206 U.S. 230 (1907).

decided that the Ohio court was equally competent to resolve the dispute, and, given the awkward nature of interstate pollution cases and the Court's admission that it is hard-pressed to act competently as a fact finder in original jurisdiction cases, it felt that a lower court — in this case, the state court — should decide the dispute.[14]

B. *Federal Jurisdiction*

Assuming, then, that the Supreme Court is not the proper forum, the issue of where to adjudicate interstate water pollution cases not covered by substantive federal statute must be evaluated for federal jurisdiction through the diversity of citizenship[15] and federal question statutes.[16] It is important to note that a state, in an interstate water pollution suit against citizens of another state, might want to have its own courts apply its own laws to decide the dispute. However, if the issue in question involves a federally protected right, the state will probably be forced to seek relief in a federal forum. Since there are only two methods of obtaining federal jurisdiction, diversity of citizenship and the federal question statute, and the former is inapplicable when a state is one of the parties,[17] a pollution action of the *Illinois* type must fall within the latter statute in order to support the Court's holding in *Illinois*. An examination of the federal question statute will show how the decision was made.

1. Federal Question Statute

The federal question statute states that federal district courts have original jurisdiction over all civil actions in which the matter in controversy "arises under the Constitution, laws, or treaties of the United States."[18] Assuming that the monetary requirement is satisfied,[19] the central issue is whether the *Illinois* type of pollution creates an action arising under the

[14] Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971). *See* 49 J. URBAN L. 612 (1971) (comment on the Court's assertion of its modern role in light of *Wyandotte*); 40 U. CIN. L. REV. 391 (1971) (approval of plaintiff's choice of forum in *Pankey*); 25 U. MIAMI L. REV. 794 (1971) (discussion on original jurisdiction problem in *Wyandotte*). However, it should be noted that Mr. Justice Douglas' dissent in *Wyandotte* stresses the responsibility of the Court to exercise jurisdiction in this type of case.

[15] 28 U.S.C. § 1332 (1970).

[16] 28 U.S.C. § 1331 (1970).

[17] A suit between a state and citizens of another state is not one which will qualify under diversity of citizenship jurisdiction. Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).

[18] 28 U.S.C. § 1331 (1970).

[19] *Id.* The federal question statute requires that the matter in controversy exceed $10,000 in value in order that a party can invoke federal jurisdiction.

"laws" of the United States within the meaning of the statute. Obviously, a federal statute which provides a suitable remedy would enable a state to invoke jurisdiction. However, when a statute does not exist or does not provide the specific remedy sought, a state, in order to qualify under the federal question statute, must prove that the right to be protected is a federal right, the infringement of which can be rectified by a federal common law remedy.[20]

a. *Federal Right*

The notion that the right of a state to be free of interstate water pollution is a federal right has never been explicitly stated in a judicial decision or federal statute. The first indication that such a right existed and had a remedy at common law came in the 1907 decision of *Georgia v. Tennessee Copper Co.* The Court held that a state has a legally protected interest to be free from pollution of its air caused by the citizens of another state.[21] The Court reviewed the issue again in *Hinderliler v. LaPlata Co.*,[22] and, although it did not directly address the fact that the apportionment of interstate waters was a federal right, it stated in dictum that the issue was a "question of 'federal common law.' "[23]

Despite the lack of specific authority on the question of the state's right as a federal right, it is plausible to argue that recent federal legislation has designated this right as federally protected. The Federal Water Pollution Control Act declares that it is federal policy to protect a state's right to control and prevent water pollution.[24] The National Environmental Policy Act of 1969[25] lends support to the argument that protection of the environment — including the state's right in question — is of federal concern and warrants federal protection.

The most recent and strongest argument classifying this state right as a federally protected one is found in the Tenth Circuit *Texas v. Pankey* opinion. In discussing the earlier *Georgia* case, the *Pankey* court said:

[20] Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U.L. REV. 385, 410 (1964). *See Future of Federal Common Law* (Panel discussion, E. Morgan, Reporter), 17 ALA. L. REV. 10, 16 (1964) (discussion of two ways to formulate federal common law).

[21] 206 U.S. at 237: "This is a suit by a State for an injury to it in its capacity as a quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

[22] 304 U.S. 92 (1938).

[23] *Id.* at 110.

[24] 33 U.S.C. § 1151(b) (1970).

[25] 42 U.S.C. § 4321 (1970).

> The source or basis for such a quasi-sovereign ecological right . . . was not discussed, but the right apparently was regarded as having existence in the common law . . . . While the case cannot be said to have recognized the right as in itself having a federal source, the Court's holding that a State is entitled to federal judicial protection of it from violation by outside sources would at least cause it to have a status of direct protectability and justiciability in relation to the Constitution.
>
> . . . .
>
> [W]e think the legal concepts and developments which have occurred since [*Georgia*] would presently call for it to be viewed as one which is within the purview of the [federal question] statute as being a right entitled to have existence under federal common law.[26]

Thus, it can be said that the state's right, if not technically a federal right, has at least a sufficient quantum of federal recognition to qualify as a federally protected right.

b. *Federal Common Law*

Since the state's ecological right concerning interstate water pollution appears to be federally protected, an infringement upon that right in the form of a public nuisance should be adjudicated by federal law. As in state courts, the federal forums recognize two kinds of law: statutory and common. In the absence of a statutory remedy, a federal court can create federal common law in fashioning an appropriate remedy.

Federal common law as a legal doctrine can be traced back to the 1842 decision in *Swift v. Tyson*,[27] which held that federal courts exercising diversity of citizenship jurisdiction were free to create common law as applied to a state.[28] In spite of the celebrated ruling in *Erie Railroad Co. v. Tompkins*,[29] which stands for the rejection of the concept of a general federal common law, the Court's ruling on the same day in *Hinderliler v. LaPlata Co.* gave rise to what has been called specialized federal common law.[30]

Of significance in these cases is the tendency of the federal courts to recognize federal common law only when there is a federal right involved. The plaintiff's right in *Erie* was a personal right protected by state law; under the diversity of citizenship jurisdiction exercised by the federal court in the case, that right was properly adjudicated under state law.

[26] Texas v. Pankey, 441 F.2d 236, 240 (10th Cir. 1971).

[27] 41 U.S. (16 Peters) 1 (1842).

[28] *Id.* at 18.

[29] 304 U.S. 64 (1938).

[30] Friendly, *supra* note 20, at 405: "The clarion yet careful pronouncement of *Erie*, 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law."

In contrast, the right in *Hinderliter* was the right of the state in connection with the apportionment of water in interstate streams. The Court's dictum stating that a controversy involving this right of a state is a question of federal common law is justified independently of the holding in *Erie.*

The tendency to recognize specialized federal common law is borne out strongly in the decision of *Clearfield Trust Co. v. United States.*[31] The Court there held that since the rights of the federal government are governed by federal law, the courts can fashion federal common law in the absence of an applicable federal statute.[32] This trend was further clarified by the decision of *Textile Workers v. Lincoln Mills,*[33] in which it was held that a federal court can create federal common law if a federal right is at issue.[34]

Once it is established that federal common law offers a cause of action where a federal right is involved, it is still necessary to show that federal common law comes within the meaning of the federal question statute. The first indication that it could be so considered appeared in the dissent in *Romero v. International Terminal Operating Co.*[35] Mr. Justice Brennan stated that since causes of action based on admiralty law are created by federal common law, these cases come under the "laws" of the federal question statute.[36]

The breakthrough on this issue came in the decision of *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*[37] The Second Circuit held that, in the absence of a statutory remedy,[38] not only are claims for negligence and breach of contract with regard to interstate communications services governed by federal common law, but that the word "laws" in the federal question statute should be construed to include laws created by federal judicial decisions as well as those created by federal legislation.[39] Thus, Brennan's theory as

[31] 318 U.S. 363 (1943).

[32] *Id.* at 366, 367.

[33] 353 U.S. 448 (1957).

[34] *Id.* at 456.

[35] 358 U.S. 354 (1959).

[36] *Id.* at 393. Mr. Justice Brennan also cites Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1955): "[I]n the absence of controlling acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty."

[37] 391 F.2d 486 (2d Cir. 1968).

[38] *Id.* at 491. The court held that federal legislation had pre-empted the field of interstate service by communication carriers, but "[w]here neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law." *Id.*

[39] *Id.* at 492.

stated in his *Romero* dissent became the majority view in *Ivy Broadcasting,* and federal common law based on federal rights outside the admiralty area came within the meaning of the statutory language.

Having proved that federal common law is deemed to have existence within the meaning of the federal question statute, all that a state involved in an interstate water pollution dispute must do is look to the decision in *Texas v. Pankey*[40] for the definitive opinion sanctioning federal common law and federal jurisdiction in this area. In *Pankey,* the state sought to enjoin the defendants, citizens of New Mexico, from using a certain pesticide which was threatening to pollute an interstate stream and affect the plaintiff's use and enjoyment thereof.[41] The court held that the public nuisance involving the ecological rights of the state are to be adjudicated under federal common law, and therefore, federal jurisdiction of the district court could properly be invoked under the federal question statute.[42] Thus, given *Pankey* and the preceding cases, one should be able to prove that the state's right is a "federal right" protected by federal common law to be created by a federal district court.

II. The *Pankey-Wyandotte* Conflict

The appropriate forum and federal common law issues connected with federal jurisdiction appeared to be well settled by *Pankey.* But the Supreme Court's decision of *Ohio v. Wyandotte Chemicals Corp.* created confusion and despair among environmentalists with regard to interstate water pollution. Not only did the Court, in its refusal to exercise original jurisdiction,[43] remit the parties to the state court for adjudication of the issues, but it also implied disapproval of the validity of federal common law to govern a fact situation similar to that in *Pankey.*[44]

Federal jurisdiction was not granted in *Wyandotte* because the Court did not think the state's right was a federal right or the public nuisance issue one to be adjudicated under federal common law. The Court stated that the public nuisance issue,

[40] 441 F.2d 236 (10th Cir. 1971).

[41] *Id.* at 238, 239.

[42] *Id.* at 240.

[43] Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971). The Court's concern with its primary responsibility as an appellate tribunal and its fear of possible abuse of the opportunity to resort to its original jurisdiction in suits of this nature prompted the exercise of its discretion to deny original jurisdiction. *See* note 14 *supra.*

[44] The only significant difference between the two cases is that in *Wyandotte* the interstate waterway was Lake Erie.

being involved in local law, could more properly be resolved by the Ohio Supreme Court, especially since no important problems of federal law were involved.[45]

The conflict between *Pankey* and *Wyandotte* becomes most confusing when one considers that the Court in *Wyandotte* dismissed the federal common law issue in a dictum footnote:

> [T]his particular case cannot be disposed of by transferring it to an appropriate federal district court since this [diversity of citizenship] statute by itself does not actually confer jurisdiction on these courts . . . and no other statutory jurisdictional basis exists. . . . Nor would federal question jurisdiction exist under 28 U.S.C. § 1331. So far as it appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).[46]

The Court did not explain its decision with regard to the notion of the state's federally protected right. Although *Pankey* was not specifically overruled, the Court's pronouncement that state law should govern the dispute created an irreconcilable conflict[47] with the *Pankey* holding on both the federal right and federal common law issues.

III. THE CONFLICT RESOLVED

The conflict that the *Pankey* and *Wyandotte* decisions created has been resolved by *Illinois v. City of Milwaukee.*

A. *The Appropriate Forum*

The Court resolved the issue of the proper forum for adjudication of a public nuisance suit concerning interstate water pollution by construing article III of the Constitution[48] and the federal question statute[49] to declare that original jurisdiction will be declined where another court has the authority to decide the dispute.[50] While apparently following the rationale in *Wyandotte* with regard to the problems inherent in original jurisdiction, the Court stated that the federal district court is the proper forum *if* the defendants can be sued in a federal court.[51] Thus, the holding in *Wyandotte* that federal courts would not exercise jurisdiction in this type of suit was revised.

B. *Federal Common Law*

Having selected the appropriate forum, the Court then

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45 401 U.S. at 498-500.
46 *Id.* at 498.
47 For a discussion of this conflict, see Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 439 (1972); Note, *supra* note 3, at 186-98.
48 U.S. CONST. art. III, § 2.
49 28 U.S.C. § 1331 (1970).
50 406 U.S. at 93-94.
51 *Id.* at 98.

held that the public nuisance involves a federal right to be adjudicated by federal common law — the prerequisites necessary to invoke jurisdiction under the federal question statute.

The Court cited *Georgia* and *Hinderliler* to imply that the state's ecological right can effectively be classified as a federal right.[52] Being cognizant of the trend in recent federal environmental legislation of declaring the national environment to be federally protected, the Court merely clarified the concept of the state's right as a federal right and overruled the basis upon which *Wyandotte* was decided.

With the federal right issue resolved, the Court sanctioned the *Pankey* rationale on the federal common law issue and cited *Ivy Broadcasting* and *Pankey* as authority for its ruling. The Court stated that when the state's right is infringed upon by public nuisance, the dispute is to be governed by "the applicable federal common law [depending] on the facts peculiar to the particular case."[53]

The *Illinois* case thus resolved the conflict between *Wyandotte* and *Pankey* by adopting a portion of each decision. From *Pankey* the Court took the holding which validated federal common law, and from *Wyandotte* it accepted the decision to avoid original jurisdiction.

Conclusion

The Court in *Illinois* was aware of the temporary nature of its decision:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.[54]

However limited this decision may be, it represents a clear statement of principles of law and procedure which will have a significant impact on future environmental litigation.

A. *The Decision and the Role of Equity*

The traditional remedy for a public nuisance is an injunction; yet, the Court's final remedy in *Illinois* is less than unwavering: "There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern."[55] A court sitting in equity will undoubtedly take into consideration the economic and political

[52] *Id.* at 104-05.
[53] *Id.* at 106.
[54] *Id.* at 107.
[55] *Id.* at 107-08.

aspects of the controversy before it. There is the possibility that the flexibility of injunctive relief may, in some instances, weaken the impact of a pro-environmental verdict.[56] It is equally possible that equity may fashion remedies more appropriate than an injunction.

B. *Impact of the Decision*

The *Illinois* decision stands for the fact that federal common law will be used or created to resolve this aspect of interstate water pollution. The need for a relatively uniform body of law, consistent with the avowed federal policy of protecting the environment, is potentially satisfied by this decision. There may be some concern over the ability of a court to decide the complex issues involved in litigation of this nature,[57] but most commentators have faith in the role of the courts in this area.[58] Future litigation will indicate the true measure of a court's capacity to deal with this type of suit.

The most encouraging aspect of *Illinois* is the specificity with which the Court lays down the mandate of federal district court jurisdiction and the use of the appropriate theory of law. How much litigation this decision will precipitate is unknown, but if a state is harmed by interstate water pollution and seeks a remedy, that state is now assured that its problem is of enough importance to the well-being of the national environment to be dealt with as a federal question and to be resolved by federal common law.

Richard A. Sherman

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[56] The Court may have been wary of the adverse effects of an absolute injunction similar to the one issued in Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), where it was stated that the "possible disaster to those outside the State must be accepted as a consequence of her standing on her extreme rights." *Id.* at 239. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 309, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (example of the flexible nature of injunctive relief in a nuisance case).

[57] For a discussion of the limitations of the courts, *see* Note, *The Role of Courts in Technology Assessment*, 55 CORNELL L. REV. 861 (1970).

[58] Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 566 (1970): "[T]he courts, in their own intuitive way — sometimes clumsy and cumbersome — have shown more insight and sensitivity to many of the fundamental problems of resource management than have any of the other branches of government."

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